

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 15 July 2011

**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**PUBLIC REDACTED VERSION**

**With confidential Annex 1, public redacted Annex 2 and public Annex 3**

**Closing submissions of the Defence**

**Source: Defence team of Mr Thomas Lubanga**

**Document to be notified in accordance with regulation 31 of the Regulations of the Court to:**

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**PART I: PREJUDICE TO THE INTEGRITY OF THE TRIAL AFFECTING THE RELIABILITY OF ALL EVIDENCE PRESENTED BY THE PROSECUTION, RENDERING ANY CONVICTION BEYOND ALL REASONABLE DOUBT IMPOSSIBLE**

1. By an application dated 10 December 2010, the Defence informed the Chamber of serious prejudice to the integrity of the judicial proceedings and breaches of fair trial rules.<sup>1</sup> The Defence argued that the prejudice and breaches were of such gravity as necessarily to entail the immediate and permanent stay of proceedings.
2. By decision of 23 February 2011,<sup>2</sup> the Chamber rejected the Defence application, finding that the gravity threshold required for a stay of proceedings had not been reached and that it was appropriate to continue the trial to its conclusion. Without ruling on the merits of the Defence allegations,<sup>3</sup> the Chamber essentially held that even if the accusations against persons acting on behalf of the Office of the Prosecutor, Prosecution witnesses, and participating victims were proved to be wholly accurate, the resulting situation would not render the continuation of the trial impossible.<sup>4</sup> The Chamber stated that at the appropriate time – at the end of the trial – it would consider the merits of these allegations and, if necessary, would draw the necessary conclusions with regard, *inter alia*, to the reliability of the evidence presented.
3. Accordingly, without rehearsing herein its previous submissions, the Defence requests the Chamber to consider, *mutatis mutandis*, the body of facts and

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<sup>1</sup> ICC-01/04-01/06-2657-Conf-tENG.

<sup>2</sup> ICC-01/04-01/06-2690-Conf.

<sup>3</sup> Save for the allegation that the Office of the Prosecutor knowingly allowed itself to be infiltrated and used by the Congolese authorities for political ends, which the Chamber rejected: ICC-01/04-01/06-2690-Conf, paras. 193 and 199.

<sup>4</sup> ICC-01/04-01/06-2690-Conf, para. 218.

arguments set out in the Defence application for a permanent stay of the proceedings.

4. Owing to their scope and gravity, the inevitable effect of the prejudice caused to the integrity of the judicial proceedings and of the breaches of fair trial rules as described in the above-mentioned application is to render a conviction beyond all reasonable doubt impossible. The observations set out hereinafter are intended to summarise the principal prongs of this argument.
5. Firstly, evidence was brought to show that persons acting on behalf of the Office of the Prosecutor, particularly Intermediaries W-0316, W-0321, W-0143, and W-0031, acting individually or in concert, elicited and organised the presentation of false testimony intended to secure the conviction of the Accused.<sup>5</sup> The direct involvement of these persons acting on behalf of the Office of the Prosecutor in the presentation of false testimony before the Chamber was acknowledged by Witnesses W-0015, D01-0016, D01-0003 and D01-0004<sup>6</sup> and clearly shown for all the Prosecution witnesses presented as former child soldiers. All these witnesses made manifestly mendacious statements.<sup>7</sup> Witness D01-0036 confirmed the mendaciousness of these testimonies, the manipulation that these victims were subjected to by persons acting on behalf of the Prosecutor, and the Prosecutor's deliberate choice not to conduct thorough investigations into this manipulation.<sup>8</sup>
6. The fact that a significant number of the Prosecution witnesses provided false testimony at the instigation of persons acting on behalf of the Office of the Prosecutor automatically casts extremely serious doubts on the reliability of the statements of the other witnesses in regard to whom proof of such manipulation could not be formally provided.

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<sup>5</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 27-199.

<sup>6</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 34-61 and 81-101; see also *infra*, Part III.

<sup>7</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 27-199; see also *infra*, Part III.

<sup>8</sup> See *infra*, analysis of the statements of D01-0036, paras. 326-332.

7. The aforementioned persons acting on behalf of the Office of the Prosecutor, who were directly involved in the investigations and frequently called upon to interact with witnesses for a variety of reasons, became aware of the identities of all the witnesses called and had numerous opportunities to approach them. The fact that these intermediaries were simultaneously acting on the instructions of the Congolese authorities<sup>9</sup> or of organisations involved in the representation of victims before the Court<sup>10</sup> necessarily leads to the inference that they very probably extended or sought to extend their fraudulent activities to all the Prosecution witnesses involved in the present case.
8. It is worth recalling that the Defence was not informed of the possibility that subornation of witnesses may have occurred until after the commencement of trial.<sup>11</sup> Kept in the dark until an advanced stage of the trial as to the identity of the intermediaries concerned and the details of their contact with the witnesses,<sup>12</sup> the Defence found it impossible to conduct all those investigations that would have enabled it, if necessary, to bring to light other acts of subornation. The Defence was unable to begin its investigations into this matter until after most of the Prosecution witnesses had appeared before the Chamber. In such circumstances, it was impossible for the Defence to examine these witnesses effectively on the circumstances in which they had been called to testify.

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<sup>9</sup> For example, ICC-01/04-01/06-2657-Conf-tENG, paras. 69-71.

<sup>10</sup> For example, ICC-01/04-01/06-2657-Conf-tENG, paras. 139-142 and 175-178.

<sup>11</sup> In the case of W-0316, this came to light during the testimony of W-0015, on 16 June 2009: T-192-CONF-FRA-CT. As regards the other intermediaries, the Defence became aware of these acts by chance in the course of its investigations.

<sup>12</sup> The identity of the intermediaries was revealed to the Defence on the following dates: W-0316: 16 June 2009 during the testimony of Witness W-0015; W-0143: 8 October 2011, after the Chamber's order of 6 July 2010; W-0321: 2 July 2009. The intermediary status of W-0031 was revealed during his cross-examination by the Defence on 2 July 2009. It was only on 7 June 2010 that the Office of the Prosecutor provided the Defence with a record of the contacts that had existed between the witnesses and Intermediaries W-0031, W-0321, W-0143 and W-0316, which was an incomplete version, as ICC-01/04-01/06-2466-Conf-AnxB. The latest modified version, which was more comprehensive, was disclosed to the Defence on 24 November 2010. See also EVD-D01-01039.

9. It follows that the duly proven fraudulent acts of persons acting on behalf of the Prosecutor impair the reliability not only of the statements of the witnesses identified as having been thus manipulated, but also, by extension, of all the evidence presented by the Prosecutor in support of his charges.
10. Secondly, evidence was brought to show that a high-ranking Congolese politician (Victim a/0270/07), who is a member of a political party which supports President Kabila, elicited and organised the presentation of false evidence (by Victims a/0225/06 and a/0225/06) before the Chamber, and himself made false statements before the Chamber intended to secure the conviction of the Accused.<sup>13</sup> What is more, evidence was brought to show that this politician pressured Defence witnesses in an attempt to obstruct the revelation of his fraudulent acts.<sup>14</sup> Witness D01-0036 also reported that the Congolese authorities had retaliated against him as a result of his testimony.<sup>15</sup>
11. These findings lend further credence to the Defence submission that the Congolese authorities fraudulently intervened in the investigations,<sup>16</sup> either [REDACTED] (Intermediary W-0316 and his subordinates), or indirectly through civil-society personalities.
12. The situation described above is obviously such as to cast extremely serious doubts on the sincerity and reliability of all the witnesses who appeared before the Chamber at the behest of the Office of the Prosecutor and the participating victims.
13. Thirdly, these diverse fraudulent acts, which led to the presentation of manifestly mendacious evidence before the Chamber, were compounded by the serious failures on the part of the Office of the Prosecutor to fulfil its

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<sup>13</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 200-228.

<sup>14</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 221-225.

<sup>15</sup> T-351-CONF-FRA-CT, p. 3, line 17, to p. 4, line 20.

<sup>16</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 69-70 and 226-228.

obligation to investigate exculpatory circumstances, and its disclosure obligations.

14. The numerous serious failures of the Office of the Prosecutor to meet its statutory obligations were described in the Defence application for a permanent stay of the proceedings of 10 December 2010.<sup>17</sup>
15. Furthermore, it appears that, when informed that the United Nations had provided it with only some of the documents in its possession regarding the activities of the UPC/RP during the period covered by the charges,<sup>18</sup> the Office of the Prosecutor took no steps to further its investigations through MONUC.<sup>19</sup> Meanwhile, because of the agreements between the United Nations and the Office of the Prosecutor, the Defence itself was unable to gain access to these documents and was therefore entirely dependent on the Office of the Prosecutor for access to them. This serious flaw in the investigations robbed the Defence of the opportunity of discovering additional material in these records to support its case.
16. These failures necessarily impair the reliability of the entire body of evidence presented at trial by the Prosecution in that the Defence was thereby deprived of the material it should have had at its disposal to test the credibility of the Prosecution evidence and to present evidence in rebuttal. The rights of the Defence both during the examination of Prosecution witnesses and as regards the presentation of exculpatory evidence can only be effectively and efficiently exercised if all the available evidence has been actively sought by the Prosecutor and then disclosed to the Defence in good time. Otherwise, judicial

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<sup>17</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 229-297.

<sup>18</sup> ICC-01/04-01/06-723-Conf-Anx, and the Prosecutor's e-mail entitled "Prosecution response to Trial Chamber's questions during the hearing on 7-4-2011", dated 11 April 2011. Regarding MONUC's seizure of UPC/RP records, see T-347-CONF-FRA-ET, p. 25, line 26, to p. 26, line 13 (D01-0011); T-345-FRA-ET, p. 51, lines 21-25, and T-346-FRA-ET, p. 43, line 15, to p. 44, line 24 (D01-0019).

<sup>19</sup> ICC-01/04-01/06-723-Conf-Anx and the Prosecutor's e-mail entitled "Prosecution response to Trial Chamber's questions during the hearing on 7-4-2011", dated 11 April 2011.

proceedings cannot enable the facts to be established with sufficient certainty to support a guilty verdict. Such is the situation in the present case.

17. In light of the foregoing, the Chamber is not in a position to attach sufficient weight “beyond all reasonable doubt” to any of the evidence presented by the Prosecutor, and a guilty verdict is thus rendered impossible.
18. Accordingly, the Chamber is bound to find that the Accused’s guilt has not been proven beyond all reasonable doubt.

## **PART II: APPLICABLE LAW**

### **I – THE ELEMENTS OF CRIMES**

#### **1. INTERNATIONAL ARMED CONFLICT AND ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER**

##### **1.1 International armed conflict**

19. The Defence fully endorses the considerations set forth in the Pre-Trial Chamber’s *Decision on the confirmation of charges* with respect to the characteristics permitting the identification of an armed conflict of an international character.<sup>20</sup>

##### **1.2 International armed conflict and the notion of “national armed forces”**

20. Article 8(2)(xxvi), which deals with the criminalisation of grave breaches of the laws and customs applicable in international armed conflict, only criminalises the enlistment and conscription of children under the age of 15 years into “national armed forces”, unlike article 8(2)(e)(vii) relating to armed conflicts not of an international character, which deals with enlistment “into armed forces or groups”.

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<sup>20</sup> ICC-01/04-01/06-796-Conf-tEN, paras. 205-215.

21. It follows that the enlistment and conscription of children under the age of 15 years into armed groups which are not “national armed forces” are not crimes if they occur within the context of an international armed conflict.
22. On this point, the Defence disputes the position taken by the Pre-Trial Chamber in the *Decision on the confirmation of charges*, whereby the criminalisation of enlistment and conscription of children under the age of 15 years into armed groups is extended to armed conflicts of an international character.<sup>21</sup>
23. Firstly, this extremely broad interpretation is inconsistent with article 22(2), which provides: “[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”
24. Secondly, the result is that it leaches the term “national” of its meaning and ignores the distinctions between the different types of conflict established by international humanitarian law.
25. Thirdly, the inclusion of the term “national” by the drafters of the Statute is not fortuitous<sup>22</sup> and it is not for the judges to criticise its relevance and appropriateness or to ignore its legal implications.

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<sup>21</sup> ICC-01/04-01/06-796-Conf-tEN, paras. 284-285.

<sup>22</sup> The drafting history of the Rome Statute shows that the choice of different vocabulary was deliberate. It was a compromise offered to the Arab States who thereby wished to exclude the applicability of the provision to Palestinian children participating in the Intifada. Although the author does not consider this to be a valid argument, he does not dispute that the drafters indeed intended to draw a distinction between the terms “national armed forces” and “armed forces and groups”. Matthew Happold, *Child soldiers in international law* (2005), JP Juris, p. 135; Mahnoush H. Arsanjani, “The Rome Statute of the International Criminal Court”, in *American Journal of International Law*, 1999, vol. 93, no. 1, p. 34; Magali Maystre, *Les enfants soldats en droit international* (2010), Pedone, pp. 154-155.

On 14 April 1998, the addendum to the Report of the Preparatory Committee on the Establishment of an International Criminal Court, options 2 and 3 of B(t), relating to war crimes committed in the context of an international armed conflict, only referred to “armed forces” and “armed groups” without any mention of the national character of such forces (A/CONF.183/2/Add.1, pp. 20-21). Yet, on 10 July 1998, at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International

26. The Pre-Trial Chamber therefore erred in holding that the enlistment and conscription of children under the age of 15 years into armed groups within the context of an international armed conflict could be criminalised on the basis of article 8(2)(b)(xxvi).

### 1.3 Armed conflict not of an international character

27. The Defence fully endorses the considerations of the Pre-Trial Chamber set forth in its *Decision on the confirmation of charges* regarding the factors that help to determine the existence of an armed conflict not of an international character.<sup>23</sup>

28. The existence of an armed conflict not of an international character presupposes proof of armed violence of a certain level of intensity over a prolonged period of time. This type of armed conflict is therefore distinct from “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.<sup>24</sup>

29. The existence of an armed conflict not of an international character also presupposes proof of a conflict “that take[s] place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.<sup>25</sup>

30. Protocol II additional to the Geneva Conventions of 8 June 1977 circumscribes this definition, emphasising that this refers to armed conflicts “which take

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Criminal Court, the bureau’s proposal only referred henceforth to “*national armed forces*” without even submitting for proposal the terms “*armed force*” and “*armed group*” (A/CONF.183/C.1/L.59, p. 7). Furthermore, the drafting history shows that the issue was in fact discussed, as can be seen in the contribution of Mr Nathan, representative of Israel, on 20 November 1998: “With regard to section B, subparagraph (t), the insertion of the word ‘national’ before the word ‘armed forces’ did not reflect the object and purpose of the Convention on the Rights of the Child.” Mr Nathan noted that the adjective ‘national’ was not used to qualify the word ‘armed forces’ in section D, subparagraph (f), which also dealt with conscription of children. A/CONF.183/C.1/SR.35, p. 5, para. 26.

<sup>23</sup> ICC-01/04-01/06-796-Conf-tEN, paras. 227-234.

<sup>24</sup> Article 8(2)(f).

<sup>25</sup> Article 8(2)(f).

place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".<sup>26</sup>

31. As the Pre-Trial Chamber emphasises, "[t]hus, in addition to the requirement that the violence must be sustained and have reached a certain degree of intensity, Article 1.1 of Protocol Additional II provides that the armed groups must: i) be under responsible command implying some degree of organisation of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol; and ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations" [emphasis added].<sup>27</sup>

## 2. ENLISTMENT AND CONSCRIPTION

32. The notion of enlistment is defined neither in the Statute nor in the Elements of Crimes. Nor did the Pre-Trial Chamber define it in its *Decision on the confirmation of charges*.
33. With a view to the implementation of international instruments for the protection of children, international organisations and the United Nations use the concept of "children associated with armed forces or armed groups" (CAAFAG), which indiscriminately includes both children assigned to military tasks and children whom a variety of circumstances have led to join armed groups even if they are not treated as soldiers within these armed

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<sup>26</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 1.1.

<sup>27</sup> ICC-01/04-01/06-796-Conf-tEN, para. 232.

groups.<sup>28</sup> This vaguely defined concept, which is intended to provide the broadest, most comprehensive protection possible, cannot be transposed into criminal contexts where the concepts are designed for prosecution, and therefore must meet strict definition requirements.<sup>29</sup>

34. The criminalisation of the “enlistment” of children under the age of 15 years as a war crime subject to the substantial penalties provided for in article 77 of the Statute requires a stricter definition of the notion of military enlistment. The act of enlistment consists in the integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in hostilities on behalf of the group. Only such integration can be the decisive criterion of an individual’s membership in an “armed group” as construed in International Humanitarian Law (IHL).<sup>30</sup>

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<sup>28</sup> See, *inter alia*, The Paris Principles, the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, p. 7: “A **child associated with an armed force or armed group**’ refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities” [emphasis in original]: [http://www.un.org/children/conflict/documents/parisprinciples/ParisPrinciples\\_EN.pdf](http://www.un.org/children/conflict/documents/parisprinciples/ParisPrinciples_EN.pdf).

<sup>29</sup> Article 22(1) and 22(2) of the Statute: “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. The definition of a crime shall be strictly construed and shall not be extended by analogy.” See also Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR, *Veeber v. Estonia*, Application No. 45771/99, 21/01/2003, para. 31: “According to the Court’s case-law, Article 7 of the Convention [...] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an Accused’s detriment. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable; ECHR, *Pessino v. France*, Application No. 40403/02, 12/02/2007, para. 35: “[TRANSLATION] Whilst the Court can easily agree that domestic courts are better placed than it is to interpret and apply domestic law, it recalls that the principle of the legality of offences and crimes enshrined in Article 7 of the Convention, bars criminal law from being extensively construed to an accused’s detriment, for example, by analogy.”

<sup>30</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, December 2008 (hereinafter “Official Position of the ICRC”), ICRC, p. 33, para. 2: “Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under IHL, the decisive criterion for

35. This definition therefore distinguishes the situation of children integrated into an armed group as soldiers to perform military functions from children who, for a variety of reasons, fall under an armed group although they perform no military functions therein.<sup>31</sup>
36. It follows that the mere acceptance into an armed group of a child who will only perform functions not linked to the hostilities cannot be considered as “enlistment”.<sup>32</sup> Put differently, the presence alone in an armed group of children who are not assigned any functions connected with the hostilities cannot be the defining criterion for the military enlistment proscribed by the Statute.<sup>33</sup>

### 3. ACTIVE PARTICIPATION IN HOSTILITIES

37. Article 8(2)(b)(xxvi) and 8(2)(e)(vii) criminalise using children under the age of 15 years to “participate actively in hostilities”.
38. In its *Decision on the confirmation of charges*, the Pre-Trial Chamber excludes from such participation only activities that are “clearly unrelated to hostilities”<sup>34</sup> and holds that the use of children as couriers,<sup>35</sup> guards of military

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individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”); *idem*, p. 34, para. 3: “An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function”: <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

<sup>31</sup> Official Position of the ICRC, p. 34, para. 2: “Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL.”

<sup>32</sup> SCSL, *The Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2004-14-AR72(E), AC, *Decision on preliminary motion based on lack of jurisdiction*, 31/05/2004, dissenting opinion of Judge Robertson, para. 9: “There may be a distinction in this respect: forcible recruitment is always wrong, but enlistment of child volunteers might be excused if they are accepted into the force only for non-combatant tasks, behind the front-lines.”

<sup>33</sup> Official position of the ICRC, p. 34, para. 2.

<sup>34</sup> ICC-01/04-01/06-796-Conf-tEN, para. 262.

<sup>35</sup> ICC-01/04-01/06-796-Conf-tEN, para. 261.

objectives, or as bodyguards of military commanders<sup>36</sup> falls within the ambit of the crimes.

39. This interpretation of the notion of “participate actively in hostilities” is excessively broad and breaches the rule set forth in article 22(2).

40. Firstly, as ruled at the ICTY and the ICTR, the notion of “participat[ing] actively in hostilities” is synonymous with the notion of “direct participation”,<sup>37</sup> which means committing “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”.<sup>38</sup>

41. In this regard, the ICRC defines direct participation in hostilities as a specific act that must fulfil three cumulative criteria:

- The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to

<sup>36</sup> ICC-01/04-01/06-796-Conf-tEN, para. 263.

<sup>37</sup> ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 02/09/1998, para. 629. See also Article 3 of the Fourth Geneva Convention, where the expression “no active part” is expressed as “*ne participant pas directement*” in the French version, which reflects the synonymy of both terms, in keeping with the Official Position of the ICRC, p. 24/57: “the terms ‘direct’ and ‘active’ refer to the same quality and degree of individual participation in hostilities.”

<sup>38</sup> ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, 06/12/1999, para. 99. See also Commentaries on Additional Protocol I, under Article 51, paras 1944-1945, <http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument>; F. Kalshoven, *Constraints on the Waging of War* (2001), Geneva, pp. 99-100: “‘to take a direct part in hostilities’ must be interpreted to mean that the persons in question perform hostile acts, which by their nature or purpose, are designed to strike enemy combatants or *matériel*; acts, in other words, such as firing at enemy soldiers, throwing a Molotov-cocktail at an enemy tank, blowing up a bridge carrying enemy war *matériel*, and so on. [...] it is beyond doubt that the notion of direct participation in hostilities is far narrower than that of making a contribution to the war effort. [...] Contributing to the war effort is an extremely elastic notion, which even under the narrowest conceivable construction covers such activities as the production and transport of arms and munitions of war, or the construction of military fortifications. It is equally certain, however, that such activities do not amount to a direct participation in hostilities.” Marco Sassoli and Antoine A. Bouvier, *Un droit dans la guerre?* [English: How Does Law Protect in War?] (2003), International Committee of the Red Cross, volume I, p. 83, footnote 3 (under the term “directly” in the phrase “[TRANSLATION] who do not or no longer directly participate in the hostilities”): “[TRANSLATION] to maintain a real and objective protective effect, IHL cannot simply consider any contribution to the war effort as a participation in hostilities. Only contributions which execute the final element in the causal chain are relevant,” which does not encompass all contributions to the war effort, but only those arising from a military function.

inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);

- There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
- The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>39</sup>

42. Thus the functions of bodyguard, guarding military objectives or any other act that does not fulfil the criteria set out above and adopted by the ICRC cannot be considered as constituting acts of participation in hostilities.

43. Secondly, the broad interpretation of the Pre-Trial Chamber leaches the adjective “active” of its meaning. This adjective specifically describes the mode of “participat[ing] in hostilities” proscribed by the Statute by distinguishing it from indirect forms of participation in hostilities,<sup>40</sup> which are not proscribed by the Statute and which might involve minors whether or not they are enlisted in an armed group.

44. Thirdly, this broad interpretation does not allow for a distinction between child soldiers not participating in hostilities and those who are actually participating. Thus, any soldier recruited within the context of an armed conflict necessarily performs functions that are directly or indirectly related to the conflict, that is, to the “hostilities”. This broad interpretation therefore makes it meaningless specifically to criminalise “participat[ing] actively in hostilities”, which is, in fact, intended to punish the endangerment of children under the age of 15 years during their participation in combat.

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<sup>39</sup> Official Position of the ICRC, p. 46.

<sup>40</sup> For the distinction between “direct” and “indirect” participation in hostilities, see Official Position of the ICRC, p. 52 to p. 55, para. 2, and p. 55, para. 2, to p. 56, para. 1.

45. Mere reference to a footnote of the draft Statute of the International Criminal Court<sup>41</sup> is manifestly insufficient to justify the extension of the notion of “participat[ing] actively” to cover all activities other than fighting that have an indirect link with the “hostilities”, such as participation in logistical operations or acting as bodyguard.<sup>42</sup>
46. Moreover, the principle of legality of crimes and offences requires the accused to have known at the time of commission of the facts what acts entailed his criminal responsibility, on the basis of the wording of the relevant provision and if necessary, aided by its interpretation by the courts.<sup>43</sup> In the instant case, the decisions of the Special Court for Sierra Leone, which were rendered after the acts being prosecuted, cannot be used in support of a broad interpretation of these notions.<sup>44</sup>
47. Accordingly, in light of the international law applicable at the time of the acts being prosecuted, the criminalisation of the active participation of children under the age of 15 years in hostilities must be viewed as referring only to active participation in military operations within fighting units.

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<sup>41</sup> A/CONF.183/2/Add.1, p. 21, footnote 12.

<sup>42</sup> ICC-01/04-01/06-796-Conf-tEN, para. 261, footnote 339.

<sup>43</sup> ECHR, *Coëme et al. v. Belgium*, Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22/06/2000, para. 145.

<sup>44</sup> The first decisions by the Trial Chambers were only rendered in 2007. However, the Accused is being prosecuted for acts that allegedly occurred between September 2002 and 13 August 2003. Moreover, the decisions of the various Chambers of the Court particularly in regard to “participating actively in hostilities” do not constitute settled jurisprudence and therefore do not meet the predictability standard. For example, Trial Chamber I held that missions to search for food were not active participation; SCSL, *The Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Judgment, 02/03/2009, para. 1743, is at odds with Trial Chamber II, which held that the search for food was one of the examples of active participation on a par with combat; SCSL, *The Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Judgment, 20/06/2007, para. 737.

## II. INDIVIDUAL CRIMINAL RESPONSIBILITY

### 1. NATURE AND LIMITS OF RESPONSIBILITY INCURRED

48. As stipulated in article 67(1)(a), the Accused must be informed in detail prior to the commencement of trial, in the Decision on the confirmation of charges, of the form of participation under which he is charged in light of articles 25 and 28 of the Statute. His responsibility can only be considered on the basis – and within the limits – of the charges confirmed by the Pre-Trial Chamber.<sup>45</sup>
49. The ICTR and ICTY Appeals Chamber clearly held that the Prosecutor could on no account plead at the end of the trial a mode of responsibility other than the one on whose basis proceedings were instituted against the accused.<sup>46</sup>
50. On the basis of the accused's fundamental right to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence, the ICTR and ICTY Appeals Chamber emphasises in particular that:

“With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, when the Prosecution charges the “commission” of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether

<sup>45</sup> See articles 61(1) and 74(2) of the Statute.

<sup>46</sup> ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-A, AC, Judgment, 22/03/2006, para. 62; ICTR, *The Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, AC, Judgment, 20/10/2010, para. 37: “In sum, the Appeals Chamber finds that the Indictment does not plead ‘commission’ as a form of individual criminal responsibility for the crimes of genocide and murder and extermination as crimes against humanity for the killing of Madame Rudahunga and the beating of her two children and two other Tutsi civilians and for the abduction and subsequent killing of Tutsi refugees from the Saint Léon Minor Seminary. By convicting Rukundo of ‘committing’ these crimes, the Trial Chamber erred in law by expanding the charges against Rukundo to encompass an unpleaded form of responsibility. Even if the failure to plead ‘committing’ with respect to these events could be cured, as the Prosecution suggests, a review of the Prosecution’s opening statement reveals that ‘committing’ was not part of its case at the commencement of the case.”

the term is to be understood as meaning physical commission by the Accused or participation in a joint criminal enterprise, or both. The Appeals Chamber also considers that it is preferable for an indictment alleging the Accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged."<sup>47</sup>

51. *Mutatis mutandis*, it follows that, at the end of the case at bar, the Accused's responsibility can only be considered in light of the form of participation stated and circumscribed in the *Decision on the confirmation of charges*.
52. In the case at bar, the Accused is prosecuted solely on the basis of article 25(3)(a) and, under the modes of liability provided for in this article, as "co-perpetrator".<sup>48</sup> This precise and express delimitation in the *Decision on the confirmation of charges* excludes the mode of responsibility provided for in article 28 and the other modes of responsibility provided for in article 25(3)(b) 25(3)(c) and 25(3)(d), as well as responsibility for indirect perpetration as provided for in article 25(3)(a).
53. None of the parties has applied to the Chamber for this essential aspect of the charges to be amended pursuant to regulation 55 of the Regulations of the Court. Nor has the Chamber considered such amendment.
54. Accordingly, the criminal responsibility of the Accused can only be contemplated in light of article 25(3)(a) as co-perpetrator, to the exclusion of all other modes of responsibility.
55. On no account can the Accused's responsibility be contemplated in light of the provisions of article 28 regarding the responsibility of superiors or in light of the other modes of responsibility described under article 25, in particular, modes of responsibility relating to complicity.
56. Likewise and *a fortiori*, the Accused's criminal responsibility cannot be contemplated in light of other forms of participation not included in the

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<sup>47</sup> ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, AC, Judgment, 17/09/2003, para. 138.

<sup>48</sup> ICC-01/04-01/06-796-Conf-tEN, para. 410 [emphasis added].

Statute, such as the doctrine of joint criminal enterprise developed in ICTY case law.<sup>49</sup>

57. Finally, the *Decision on the confirmation of charges* stated that the Accused is prosecuted solely as “co-perpetrator”,<sup>50</sup> that is, for having “jointly with [...] another person” committed the crimes charged.<sup>51</sup> Consequently, the Accused’s responsibility can only be contemplated within the ambit of “co-perpetration”, that is, commission “jointly with [...] another person”, and this analysis cannot be extended to the possibility of commission “through another person”, which is different from co-perpetration, with which the Accused is expressly and exclusively charged.

## 2. OBJECTIVE ELEMENTS

### 2.1 Responsibility for “commission” under article 25(3)(a) requires a positive act to be carried out in person by the accused.

58. In this respect, it differs from civilian or military command responsibility.
59. Article 28 of the Statute makes specific provision for the “responsibility of commanders and other superiors” for crimes committed by the forces placed under their command or by their subordinates. This is a mode of responsibility by omission, based on the notion of the “effective control”<sup>52</sup> of superiors over the “forces” or the “subordinates” placed under their authority.

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<sup>49</sup> The Pre-Trial Chamber emphasised that the notion of co-perpetration suggested by the wording of article 25(3)(a) differed significantly from the notion of co-perpetration based on the existence of a joint criminal enterprise or common purpose which is embodied in ICTY case law (ICC-01/04-01/06-796-Conf-tEN, paras. 323 and 334-335).

<sup>50</sup> ICC-01/04-01/06-796-Conf-tEN, p. 133.

<sup>51</sup> ICC-01/04-01/06-796-Conf-tEN, para. 340.

<sup>52</sup> ECCC, Case File No. 001/18-07-2007/ECCC/TC, Judgment, 26/07/2010, para. 540: “In order to demonstrate the existence of a superior-subordinate relationship, it must be established that the accused exercised effective control over the subordinate”; ICTR, *The Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, 03/07/2002, AC, Decision, para. 61: “The Appeals Chamber reiterates that the test in all cases is whether the Accused exercised effective control over his or her subordinates”; ICTY, *Prosecutor v. Delalic and Others*, Case No. IT-96-21-T, Judgment, 16/11/1998, para. 378.

60. Such command responsibility is essentially based on the possibility of “frustrating” the crime<sup>53</sup> and, consequently, on the power to control its execution.
61. It is absolutely distinct<sup>54</sup> from responsibility by “commission” provided for in article 25(3)(a), which, in accordance with the general principles of criminal law, requires a positive act to be carried out in person<sup>55</sup> by the accused.
62. Unlike the responsibility of military commanders and other superiors provided for in article 28, individual criminal responsibility under article 25(3)(a) is neither responsibility by omission nor responsibility for the acts of another person. It requires evidence of a positive act that can be imputed to the accused.

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<sup>53</sup> ICTY, *Prosecutor v. Delalic and Others*, Case No. IT-96-21-T, Judgment, 16/11/1998, para. 377: “The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine” [emphasis added].

<sup>54</sup> ICC-01/04-01/06-796-Conf-tEN, para. 320; ICC-01/04-01/06-8-US-Corr, 20 February 2006, para. 78.

<sup>55</sup> “[TRANSLATION] No one is criminally liable except for his own conduct”; French Criminal Code, Article 121-1.

**2.2 Responsibility for “commission” under article 25(3)(a) requires the accused personally to make an essential contribution to the commission of the crime**

63. Responsibility for “commission” under article 25(3)(a), as perpetrator or co-perpetrator, is distinct<sup>56</sup> from the forms of indirect participation falling under complicity provided for in article 25(3)(c) and 25(3)(d), based on the notion of “substantial contribution” to the commission of the crime.<sup>57</sup>
64. It follows that responsibility under article 25(3)(a) requires direct participation in the crime itself in the form of a “contribution” of greater magnitude than that required for complicity, that is to say, an essential contribution<sup>58</sup> to the commission of the crime. The “contribution” required under article 25(3)(a) must be such that the crime would not have been committed had there been no such contribution.<sup>59</sup> It must be a *conditio sine qua non* for the commission of the crime.<sup>60</sup> Contrary to the argument advanced by the Prosecutor, the essential character of this contribution must be assessed in light of the events

<sup>56</sup> ICC-01/04-01/06-796-Conf-tEN, para. 320; ICC-01/04-01/06-8-US-Corr, para. 78.

<sup>57</sup> ICTY, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10/12/1998, para. 249: “the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime...”; ICTY, *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, AC, Judgment, 29/07/2004, para. 46; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment, 06/12/1999, para. 43: “The Chamber holds that aiding and abetting include all acts of assistance in either physical form or in the form of support; nevertheless, it emphasizes that any act of participation must substantially contribute to the commission of the crime.”; ICTR, *The Prosecutor v. Bagalishema*, Case No. ICTR-95-1A, Judgment, 07/06/2001, para. 33: “For an accomplice to be found responsible for a crime under the Statute, he or she must assist the commission of the crime; the assistance must have a substantial effect on the commission of the crime”, cited in ICC-01/04-01/06-796-Conf-tEN, para. 347.

<sup>58</sup> ICC-01/04-01/07-717, para. 524: “The Chamber considers that the second objective requirement of co-perpetration based on joint control over the crime is the coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.” Cited in ICC-01/04-01/06-796-Conf-tEN, para. 367.

<sup>59</sup> ICC-01/04-01/07-717, para. 525: “When the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime.”

<sup>60</sup> ICC-01/04-01/06-2748-Conf, para. 65, footnote 109.

as they actually occurred and not, abstractly, having regard to the “role” assigned to the accused within the framework of a prior concerted plan.<sup>61</sup>

65. Contrary to the Prosecutor’s arguments, the notion of “functional control”<sup>62</sup> does not fall within the ambit of “commission” as defined in article 25(3)(a). The criminal participation expressed by the verb “to commit”, whether individually or “jointly with [...] another person” (co-perpetration), is not based on the capacity to frustrate the crime or to punish its perpetrators, but on the existence of a positive, personal and direct contribution, without which the crime would not have existed. In this regard, the concept of co-perpetration propounded by the Pre-Trial Chamber and adopted by the Prosecutor, which is based on the notion of “control over the crime”<sup>63</sup> constitutes an excessively broad interpretation of article 25(3)(a). The doctrinal and case law foundation on which that theory rests is too narrow to be acceptable and breaches the rule of strict construction laid down in article 22(2).

### **2.3 Responsibility for “commission” under article 25(3)(a) requires personal and direct participation in the crime itself**

66. Unlike responsibility under article 25(3)(b), responsibility under article 25(3)(a) requires personal and direct participation in the crime itself.
67. The responsibility of the “principals” and of those who, in one way or another, solicit or induce the commission of a crime without participating directly in its execution can be determined exclusively on the basis of article 25(3)(b) and not on the basis of article 25(3)(a).
68. Accordingly, from a comparative analysis of articles 25(3)(a), 25(3)(b) and 25(3)(c), it can be seen that responsibility under article 25(3)(a) requires

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<sup>61</sup> ICC-01/04-01/06-2748-Conf, para. 65.

<sup>62</sup> ICC-01/04-01/06-2748-Conf, para. 61.

<sup>63</sup> ICC-01/04-01/06-796-Conf-tEN, para. 341.

evidence of a positive act of participation in the crime ascribed to the accused, constituting an essential contribution of the accused to the commission of the crime, without which the crime would not have been committed, which must also take the form of personal and direct participation in the crime.

**2.4 Responsibility based on commission “jointly with [...] another person” is distinct from responsibility based on commission “through another person”**

69. Article 25(3)(a) distinguishes three different forms of responsibility as main perpetrator: (1) commission of the crime as an individual; (2) jointly with another person; and (3) through another person.
70. Pre-Trial Chamber I rightly characterised the commission of a crime “jointly with [...] another person” as “co-perpetration”.<sup>64</sup> It is exclusively on this basis that the Accused is being prosecuted.
71. The commission of a crime “through another person” refers to a form of responsibility different from “co-perpetration”. It applies where the direct perpetrator of the crime is merely an instrument in the hands of the main perpetrator.
72. In accordance with article 22(2), that specific form of responsibility as main perpetrator must be strictly construed. In this regard, the complex theory propounded by Pre-Trial Chamber II in the case of *The Prosecutor v. Katanga and Ngudjolo*, whereby that form of criminal participation provided for in the Statute would make it possible for leaders to incur criminal responsibility as a result of their “control over the organisation” and thus their “control over the crimes” committed by the members of that organisation, constitutes an excessively broad interpretation: if the drafters of the Statute had wished to include a form of responsibility based on the notions of “control over the

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<sup>64</sup> ICC-01/04-01/06-796-Conf-tEN, para. 332.

crime” or “control over the organisation”, such notions would have been clearly expressed as such in the Statute. That is not the case.

73. In any event, this form of criminal participation “through another person” differs from “co-perpetration” on account of its indirect nature. Commission “jointly with [...] another person” under article 25(3)(a) requires direct participation in the crime.

**2.5 Responsibility for “commission” “jointly with [...] another person” requires evidence of a common plan directed at the commission of a crime, agreed and executed by the co-perpetrators**

74. By its very nature, the commission of a crime “jointly with [...] another person”, characterised as “co-perpetration” by the Pre-Trial Chamber, requires acting in concert and, as the case may be, a “common plan” between the co-perpetrators.
75. Nonetheless, the Pre-Trial Chamber erroneously held that the plan need not in itself be criminal and that it is sufficient “that the co-perpetrators are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime and they accept such an outcome”.<sup>65</sup>
76. That position invites two observations.
77. Firstly, the Pre-Trial Chamber states, somewhat ambiguously, that “the common plan must include an element of criminality, although it does not need to be specifically directed at the commission of a crime”.<sup>66</sup> In fact, the notion of joint commission or “co-perpetration” in criminal matters necessarily indicates the existence of an intrinsically criminal common plan. Criminal responsibility on the basis of co-perpetration requires evidence of a

<sup>65</sup> ICC-01/04-01/06-796-Conf-tEN, para. 344.

<sup>66</sup> ICC-01/04-01/06-796-Conf-tEN, para. 344.

criminal purpose linking the co-perpetrators.<sup>67</sup> Participation in a “plan” which in itself is not criminal but merely capable of creating conditions conducive to the commission of criminal acts cannot be regarded as characterising the *actus reus* of criminal co-perpetration.

78. Secondly, the Pre-Trial Chamber conflates the physical act of co-perpetration, the common plan and its implementation, with its intentional element, which is discussed below. However, as demonstrated hereunder, mere knowledge “of the risk that implementing the common plan will result in the commission of the crime” is insufficient to engage criminal responsibility by way of co-perpetration.

### 3. SUBJECTIVE ELEMENTS

#### 3.1 Article 30

79. Article 30 provides that “intent” and “knowledge”, constituting the mental element of the crime, mean “awareness that a circumstance exists or a consequence will occur in the ordinary course of events” [emphasis added].
80. The Pre-Trial Chamber considers that the requirements of “intent” and “knowledge” are met where “the suspect is aware of the risk that the objective elements of the crime may result from his or her actions or omissions and accepts such an outcome by reconciling himself or herself with it or consenting to it”.<sup>68</sup>
81. However, by interpreting the expression “in the ordinary course of events” by reference to the existence of a “risk”, that is to say, a high or low probability

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<sup>67</sup> Even the theory of extended joint criminal enterprise, appreciably broader than the notion of co-perpetration under article 25(3)(a) and not applicable before the ICC, requires that finding; ICTY, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment, 02/08/2001, para. 616; ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, AC, Judgment, 29/07/2004, para. 33 (citing *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgment, 25/02/2004, para. 101: “[...] With regard to the extended form of joint criminal enterprise, what is required is the intention to participate in and further the common criminal purpose of a group” [emphasis added].

<sup>68</sup> ICC-01/04-01/06-796-Conf-tEN, para. 352 [emphasis added].

that a criminal act will be carried out,<sup>69</sup> the Pre-Trial Chamber, thereby applying the notion of “*dolus eventualis*”,<sup>70</sup> adopts an excessively broad interpretation of article 30.

82. On this point, without needing to rehearse those arguments in the present brief, the Defence fully endorses the analysis set out by Pre-Trial Chamber II in its *Decision on the Confirmation of Charges* rendered in the case of *The Prosecutor v. Jean-Pierre Bemba*, at the end of which the Chamber concluded: “the text of article 30 of the Statute does not encompass *dolus eventualis*, recklessness or any lower form of culpability”.<sup>71</sup>
83. Thus, as emphasised by Pre-Trial Chamber II: “the suspect could not be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan”.<sup>72</sup>
84. The Defence therefore endorses Pre-Trial Chamber II’s finding that the theory of co-perpetration requires the “co-perpetrators’ mutual awareness that implementing the common plan will result in the fulfillment of the material elements of the crime” and that the co-perpetrators “carry out their actions with the purposeful will (intent) to bring about the material elements of the crimes, or are aware that in the ordinary course of events, the fulfillment of the material elements will be a virtually certain consequence of their actions”.<sup>73</sup>
85. Lastly, the Defence endorses the position of Pre-Trial Chamber I and Pre-Trial Chamber II that, in order to be considered a co-perpetrator, the suspect must be “aware of his essential role in the implementation of the crime” and must

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<sup>69</sup> ICC-01/04-01/06-796-Conf-tEN, paras. 353-354.

<sup>70</sup> ICC-01/04-01/06-796-Conf-tEN, para. 352.

<sup>71</sup> ICC-01/05-01/08-424, paras. 352-370; see, in particular, para. 369.

<sup>72</sup> ICC-01/05-01/08-424, para. 369 [emphasis added].

<sup>73</sup> ICC-01/05-01/08-424, para. 370.

be aware, “due to such essential role, [that he is] capable of frustrating its implementation and accordingly, the commission of the crime”.<sup>74</sup>

### **3.2 The specific subjective element of the crime of enlisting children under the age of 15 years**

86. The Elements of Crimes require evidence that “the perpetrator knew or should have known that such person or persons were under the age of 15 years” [emphasis added].
87. The “should have known” requirement constitutes an exception to the “intent and knowledge” requirement set forth in article 30 of the Statute,<sup>75</sup> as regards knowledge on the part of the Accused of the age of the recruits. In this regard it must be construed as strictly as possible.
88. Firstly, the expression “should have known” implies the pre-existence of a legal obligation on the accused, requiring him to ascertain the age of the recruits. It therefore requires evidence of a legal obligation to act according to the domestic law of the relevant country or according to the relevant principles of international law. This legal obligation is specifically incumbent upon the accused himself by reason of his own functions. It goes without saying that it would be insufficient to make a vague and general statement that the mere fact of taking part in military recruitment operations would, *per se*, impose an obligation of this kind. The ICTY emphasises in this regard that the notion of “had reason to know” does not imply responsibility for “not having taken general and abstract organisational measures to detect in a timely manner unlawful acts committed or about to be committed by subordinates”.<sup>76</sup>

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<sup>74</sup> ICC-01/05-01/08-424, para. 371, citing ICC-01/04-01/06-796, paras. 366-367.

<sup>75</sup> ICC-01/04-01/06-796-Conf-tEN, para. 359.

<sup>76</sup> Marx Henzelin, *Les “raisons de savoir” du supérieur hiérarchique qu’un crime va être commis ou a été commis par un subordonné, Examen de la jurisprudence des Tribunaux pénaux internationaux pour l’Ex-Yougoslavie et le Rwanda*, p. 120:

89. Secondly, the scope of this legal obligation must be assessed *in concreto* in light of the context and the circumstances of the case. The finding that the suspect did not, at the material time, have any effective means of verifying the age of recruits must necessarily give rise to the lifting of the “presumption of knowledge” instituted by that provision.

**PART III: CRITICAL ANALYSIS OF THE TESTIMONIAL EVIDENCE SUBMITTED BY THE PROSECUTOR AND THE PARTICIPATING VICTIMS**

90. The Defence submits the following observations on the testimonial evidence given during the Prosecutor’s presentation of his evidence:

**I – WITNESSES PRESENTED AS FORMER CHILD SOLDIERS**

91. As shown below, all the testimonial evidence concerning witnesses being presented to the Court as former child soldiers has proved to be mendacious. All the witnesses who appeared as former child soldiers, and the intermediaries associated with those witnesses, participated in the elaboration of a mendacious operation intended to mislead the Court.

**1. THE EXPERT REPORTS**

92. In paragraphs 358 and 359 of his closing brief, the Prosecutor relies on expert reports concerning the X-ray examination of bones with a view to determining the age of Witnesses W-0007, W-0008, W-0010, W-0011, W-0157, W-0213, W-0294, W-0297 and W-0298.

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([http://www.lalive.ch/files/mhe\\_Les\\_raisons\\_de\\_savoir\\_du\\_superieur\\_hierarchique\\_qu\\_un\\_crime\\_va\\_etre\\_commis\\_...pdf](http://www.lalive.ch/files/mhe_Les_raisons_de_savoir_du_superieur_hierarchique_qu_un_crime_va_etre_commis_...pdf)), in relation to the judgment in the case of *Prosecutor v. Delalić and Others*, Case No. IT-96-21-A, AC, Judgment, 20/02/2001, paras. 238-239.

93. However, the experts themselves acknowledged the limitations<sup>77</sup> of such a method and the need to proceed with caution,<sup>78</sup> notably for the following reasons:

- This method was established for the purposes of medical diagnosis, in order to detect different pathologies such as slow growth, and not specifically to determine the age of an individual.<sup>79</sup> Expert W-0358 noted also that using this method to determine the age of individuals is a departure from the purposes for which it was originally developed.<sup>80</sup>
- The method used<sup>81</sup> is suitable for European and American populations and there are no reference data on sub-Saharan African populations.<sup>82</sup>
- Based on the Greulich and Pyle atlas, this method was established on the basis of a study carried out on a North American population approximately 50 years ago, and the atlas has not been updated since.<sup>83</sup>
- It is a semi-quantitative method,<sup>84</sup> the results of which provide only an approximate evaluation of the age of the individual.<sup>85</sup>

94. W-0359 stressed that “[TRANSLATION] you must understand that this is not an exact science”.<sup>86</sup>

95. In light of the foregoing, the results of the analyses based on the X-ray examination of the aforementioned witnesses cannot be considered reliable.

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<sup>77</sup> T-172-CONF-FRA-CT, p. 11, lines 23-24.

<sup>78</sup> T-172-CONF-FRA-CT, p. 91, lines 19-20.

<sup>79</sup> T-172-CONF-FRA-CT, p. 89, lines 19-25.

<sup>80</sup> T-172-CONF-FRA-CT, p. 90, line 15, to p. 91, line 18.

<sup>81</sup> T-172-CONF-FRA-CT, p. 13, lines 16-21.

<sup>82</sup> T-172-CONF-FRA-CT, p. 87, line 19, to p. 88, line 16. W-0359 stated that this method was established between 1931 and 1942 based on a white population, in what is described as normal socio-economic conditions.

<sup>83</sup> T-172-FRA-CONF-CT, p. 34, lines 15-18.

<sup>84</sup> T-172-CONF-FRA-CT, p. 33, line 24, to p. 34, line 2.

<sup>85</sup> T-172-CONF-FRA-CT, p. 35, lines 13-21.

<sup>86</sup> T-172-CONF-FRA-CT, p. 33, lines 16-25.

96. It must be pointed out, furthermore, that the Prosecutor draws inferences on numerous occasions even though the result of the expert report either contradicts the age stated by the witness<sup>87</sup> or is inconclusive.<sup>88</sup>

## 2. THE EVIDENCE OF WITNESSES PRESENTED AS FORMER CHILD SOLDIERS

### 2.1 DRC-OTP-WWWW-0007 ([REDACTED]) and DRC-OTP-WWWW-0008 ([REDACTED])

97. The Defence refers to its observations at paragraphs 156-165 of its “Defence Application Seeking a Permanent Stay of the Proceedings”,<sup>89</sup> paragraph 16 of its Reply to the “Prosecution’s Response to the Defence’s *‘Requête de la Défense aux fins d’arrêt définitif des procédures’*”,<sup>90</sup> and paragraphs 24-29, 33-36, 38, 42-45 of its Reply to the “*Réponse du Représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 à la ‘Requête de la Défense aux fins d’arrêt définitif des procédures’ datée du 10 décembre 2010*”.<sup>91</sup>
98. In addition, the Defence intends to demonstrate, firstly, that it has been acknowledged that when giving evidence before the Chamber, Witnesses W-0007 and W-0008 lied about certain aspects of their evidence concerning their family relationships and, secondly, that on the basis of the testimonial and documentary evidence it is possible to establish that those witnesses lied before the Chamber about their age, their identity, their school attendance,

<sup>87</sup> For example: W-0008: EVD-OTP-00428, T-172-CONF-FRA-CT, p. 47, lines 3-9. The expert concluded that the witness was aged at least 19 on 5 December 2007 and would therefore have been born before December 1988, contrary to the witness’s claims. W-0157: EVD-OTP-00435, T-172-CONF-FRA-CT, p. 53, lines 17-20. Therefore, if we are to rely on the result of the expert report, contrary to what he claimed, Witness W-0157 was born before December 1988. W-0294: EVD-OTP-00440, T-172-CONF-FRA-CT, p. 70, line 22, to p. 71, line 2. Thus, if we are to rely on the result of the report, Witness W-0294 was born before December 1989.

<sup>88</sup> When a subject has finished growing at the time the X-rays are taken, it is no longer possible to estimate his age (T-172-CONF-FRA-CT, p. 44, lines 9-16). For example: W-0010: EVD-OTP-00430, T-172-CONF-FRA-CT, p. 48, line 24, to p. 49, line 4. In December 2007, Witness W-0010 had finished growing. His age was estimated by experts as being over 18. Thus, Witness W-0010 was born before December 1989, on a date which cannot be determined.

<sup>89</sup> ICC-01/04-01/06-2657-Conf-tENG.

<sup>90</sup> ICC-01/04-01/06-2688-Conf.

<sup>91</sup> ICC-01/04-01/06-2684-Conf.

their recruitment by the armed forces of the UPC, and their participation in the hostilities.

*- The lie told by Witnesses W-0007 and W-0008 about their family relationship*

99. It has been acknowledged that Witnesses W-0007 and W-0008 deliberately lied, not only when giving evidence before the Court, but also during their interviews with the Office of the Prosecutor and when filing their applications to participate in the proceedings. Those lies concerned their family relationship, the identities of members of their family, and their contact with these family members.<sup>92</sup>

Their family relationship

100. Since July 2005, Witnesses W-0007 and W-0008 have steadily maintained before the Office of the Prosecutor that they are cousins, and they persisted in this lie by giving evidence to that effect under oath to the Court.<sup>93</sup>
101. In September 2009, the Defence disclosed to the Prosecutor the identity and contact details of Witness D01-0012, and information according to which “[TRANSLATION] [REDACTED] of Witnesses DRC-OTP-WWWW-0007 and DRC-OTP-WWWW-0008, [REDACTED]”.<sup>94</sup>
102. An interview of the [REDACTED] (W-0496 and W-0497) of [REDACTED] witnesses by investigators of the Office of the Prosecutor in November 2009 confirmed that information.<sup>95</sup> Prior to that interview, W-0496 and W-0497 had been informed of the meeting that had taken place between [REDACTED] and Mr Thomas Lubanga’s Defence team.<sup>96</sup>

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<sup>92</sup> ICC-01/04-01/06-2675-Conf, paras. 114-116. D01-0024, T-247-CONF-FRA-CT, p. 37, line 14, to p. 38, line 6.

<sup>93</sup> W-0007: T-149-CONF-FRA-CT, p. 69, lines 2-6, and W-0008: T-135-CONF-FRA-CT2, p. 5, lines 8-9.

<sup>94</sup> The summary of the main topics dealt with during the oral evidence of Witness D01-0012 was provided on 3 September 2009.

<sup>95</sup> W-0497: EVD-D01-00729, pp. 0128-0138, lines 621-957.

<sup>96</sup> W-0496: EVD-D01-00737, pp. 0227-0228, lines 1155-1183.

103. Confronted with the result of the Defence investigations, Witnesses W-0007 and W-0008 were forced to alter their evidence, stating in particular:

- That they had lied about their family relationship,<sup>97</sup> thus corroborating the information gathered by the Defence;<sup>98</sup>
- That their mother was called [REDACTED],<sup>99</sup> thus contradicting what they had said during their testimony<sup>100</sup> and the information appearing on documents admitted into the record of the case.<sup>101</sup> That name was confirmed by Witness D01-0012;<sup>102</sup>
- That their father was called [REDACTED].<sup>103</sup> Those names differ from the names given by the witnesses during their testimony.<sup>104</sup> Moreover, they do they match the information appearing on numerous documents in the record of the case.<sup>105</sup> Further, they do not

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<sup>97</sup> W-0008: EVD-D01-00750, p. 0380, lines 286-298; W-0007: EVD-D01-00752, pp. 0618-0621, lines 358-476. It should be noted that at the start of the interview, the witness denied that Witness W-0008 was his brother.

<sup>98</sup> D01-0012 confirmed that the witnesses were [REDACTED]. T-248-CONF-FRA-CT, p. 25, line 25, to p. 28, line 5.

<sup>99</sup> W-0007: EVD-D01-00752, pp. 0621-0622, lines 468-498 ([REDACTED]). W-0008: EVD-D01-00750, p. 0380, lines 299-313 ([REDACTED]).

<sup>100</sup> W-0007: T-148-CONF-FRA-CT, p. 17, lines 4-5. W-0008: T-135-CONF-FRA-CT, p. 4, lines 14-15. And yet, this name had been suggested to W-0008 by the Defence during his cross-examination. At the time he stated that he did not remember all the names of his family members: T-137-CONF-FRA-CT, p. 16, lines 13-16.

<sup>101</sup> For example: W-0007: ICC-01/04-01/06-216-Conf-Exp, p. 5/27, and EVD-D01-01103. W-0008: ICC-01/04-01/06-217-Conf-Exp, p. 5/30 and EVD-D01-00055.

<sup>102</sup> T-248-CONF-FRA-CT, p. 24, line 14, to p. 25, line 3.

<sup>103</sup> W-0008: EVD-D01-00750, p. 0381, lines 318-339. W-0007: EVD-D01-00753, p. 0636, lines 146-157, p. 0637, line 188, and p. 0639, lines 254-259.

<sup>104</sup> Before the Chamber, W-0008 mentioned the names of [REDACTED] (father) and [REDACTED] (mother): T-135-CONF-FRA-CT, p. 4, lines 12-15. When giving evidence, W-0007 claimed that his father was called [REDACTED]: T-149-CONF-FRA-CT, p. 53, line 5, and T-148-CONF-FRA-CT, p. 17, line 7. In his statement of 2010, W-0007 stated that his biological father was called [REDACTED], but that he grew up with his father's brother, known as [REDACTED]. See EVD-D01-00753, p. 0636, lines 146-157, p. 0637, line 188, and p. 0639, lines 254-259.

<sup>105</sup> For example: W-0007: ICC-01/04-01/06-216-Conf-Exp, p. 5/27, and EVD-D01-01103. W-0008: ICC-01/04-01/06-217-Conf-Exp, p. 5/30, and EVD-D01-00055.

correspond to the names provided by the mother of the witnesses.<sup>106</sup>

That name was confirmed by Witness D01-0012;<sup>107</sup>

- That they have brothers and sisters, whom they listed in detail by name,<sup>108</sup> which they refused to do during their testimony;<sup>109</sup>
- That they had contact with their parents<sup>110</sup> and other family members<sup>111</sup> after the war.

104. It was also established that Witnesses W-0007 and W-0008 made mendacious statements before the Chamber concerning several other essential aspects of their statements. Their mendaciousness is established by (1) the significant contradictions and implausibilities present in their evidence; (2) the obvious contradictions between their evidence and the statements of their parents, Witnesses W-0496 and W-0497; (3) the evidence of [REDACTED] (D01-0012); and (4) the documentary evidence admitted into the record of the case.

#### Their identity

105. When he met with the Office of the Prosecutor in 2005, W-0007 stated that he was called [REDACTED]. For the first time when giving evidence, he stated that he was also known as [REDACTED].<sup>112</sup>

<sup>106</sup> W-0497: EVD-D01-00729, p. 0139, lines 971-975.

<sup>107</sup> T-248-CONF-FRA-CT, p. 24, lines 2-10.

<sup>108</sup> W-0007: EVD-D01-00753, pp. 0639-0646, lines 267-514; W-0008: EVD-D01-00750, pp. 0383-0394, lines 407-751.

<sup>109</sup> W-0007 omitted to name several of his brothers and sisters: T-149-CONF-FRA-CT, p. 49, line 8, to p. 50, line 21. W-0008 stated in his evidence that he had forgotten the names of his brothers and sisters: T-137-CONF-FRA-CT, p. 13, lines 4-15.

<sup>110</sup> W-0007: EVD-D01-00754, p. 0664, lines 328-338, and p. 0665, lines 350-353 (Holidays in [REDACTED] where his family lived). That statement contradicts his evidence. See T-149-CONF-FRA-CT, p. 42, lines 16-22, and p. 53, line 8. W-0008: EVD-D01-00751, p. 0416, lines 165-166, and EVD-D01-00750, p. 0382, lines 357-377. W-0008 provided no clear response to the questions asked by the Defence in this regard: T-137-CONF-FRA-CT, p. 14, line 11, to p. 16, line 14.

<sup>111</sup> W-0008: EVD-D01-00751, pp. 0414-0415, lines 95-138. However, when giving evidence, he stated that he had not seen his brothers and sisters for a very long time and had not seen them after the battle before going into the protection programme: T-137-CONF-FRA-CT, p. 13, lines 7-23, and p. 15, lines 15-18.

<sup>112</sup> T-148-CONF-FRA-CT, p. 16, line 25.

106. The testimonial<sup>113</sup> and documentary<sup>114</sup> evidence demonstrates that W-0007 is not called “[REDACTED]” or “[REDACTED]” or “[REDACTED]”, contrary to what he stated on numerous occasions between 2005 and 2008 before the Chamber, the Office of the Prosecutor,<sup>115</sup> and the Registry of the Court.<sup>116</sup> He is in fact called [REDACTED].
107. Witness W-0008, for his part, told the Office of the Prosecutor and the Registry of the Court in 2005, and again in 2006 and 2007, that he was called [REDACTED].<sup>117</sup> However, when giving evidence, he stated that he was called [REDACTED] ([REDACTED] [Phon.]).<sup>118</sup>
108. The evidence given by D01-0012, [REDACTED], shows that the latter is not called “[REDACTED]”, but [REDACTED].<sup>119</sup> That information is corroborated by the excerpt from the Independent Electoral Commission (IEC) database,<sup>120</sup> by W-0008’s new voting card submitted by his legal representative in 2010, and by the school records admitted into the record of the case, on which the name “[REDACTED]” does not appear.<sup>121</sup>

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<sup>113</sup> T-248-CONF-FRA-CT, p. 27, lines 5-21.

<sup>114</sup> See the student cards submitted by the legal representative of Witness W-0007: EVD-OTP-00656 and EVD-OTP-00657. It should be pointed out that the name “[REDACTED]” does not appear on any of those cards. See also: the school records EVD-D01-00181, p. 4243, point [REDACTED]; EVD-D01-00182, p. [REDACTED]; EVD-D01-00183, p. [REDACTED], which bear the names “[REDACTED]”.

<sup>115</sup> The Prosecutor met Witness W-0007 in July 2005 and in January 2008.

<sup>116</sup> Attestation of birth of a child, attached to the witness’s application to participate as a victim (a/0047/06): EVD-D01-01103; Victim a/0047/06’s application to participate in the proceedings, ICC-01/04-01/06-216-Conf-Exp.

<sup>117</sup> The name [REDACTED] does not appear in his application to participate in the proceedings as a victim: T-137-CONF-FRA-CT, p. 9, lines 15-21; nor in the supplementary information dated 2007, *idem*, p. 10, lines 1-17. Furthermore, W-0008 did not mention this name during the interview with the Office of the Prosecutor in January 2008, *ibidem*, p. 10, line 23, to p. 11, line 2.

<sup>118</sup> T-135-CONF-FRA-CT, p. 4, lines 4-11. It is moreover astonishing that the legal representatives of Witness W-0008 claim that he is called “[REDACTED]”, whilst it would appear to be obvious that the interpreter or stenographer misunderstood the name “[REDACTED]”, ICC-01/04-01/06-2744-Conf-tENG, para. 31.

<sup>119</sup> T-248-CONF-FRA-CT, p. 27, lines 5-7 and 18-21.

<sup>120</sup> EVD-D01-01028.

<sup>121</sup> Voting card: EVD-OTP-00659. See also school records EVD-D01-00181, p. 4243, point IA, #3; EVD-D01-00182, p. [REDACTED]; EVD-D01-00183, p. [REDACTED], on which the names “[REDACTED]” appear.

109. The statements of W-0007 and W-0008 concerning their identity contradict those of their parents, Witnesses W-0496 and W-0497. For example, W-0497, the children's biological mother, stated that W-0008 goes only by the name of "[REDACTED]"<sup>122</sup> and that her other son is called "[REDACTED]".<sup>123</sup>

Their places and dates of birth

110. W-0007 stated for the first time when giving evidence that he was born on [REDACTED] 1987 in [REDACTED].<sup>124</sup> However, between 2005 and 2010, the witness made several contradictory statements in this regard:

- In July 2005, the witness told the Office of the Prosecutor that he was born on [REDACTED] 1991.<sup>125</sup>
- In August 2005, the witness told the IEC that he was born on [REDACTED] 1986.<sup>126</sup>
- In November 2005, the witness's attestation of birth showed the date [REDACTED] 1990.<sup>127</sup>
- In March 2009, the witness told the Chamber that he was born on [REDACTED] 1987.<sup>128</sup>
- In July 2009, the witness filed an application for reparations with the Court, giving his date of birth as [REDACTED] 1990.<sup>129</sup> and
- In November 2010, the witness stated that he was born on [REDACTED] 1987.<sup>130</sup>

<sup>122</sup> EVD-D01-00729, pp. 0137-0138, lines 914-948.

<sup>123</sup> EVD-D01-00729, p. 0135, lines 853-859. However, Witness W-0007 stated that he was known to his family as [REDACTED]: T-148-CONF-FRA-CT, p. 16, line 25, to p. 17, line 2.

<sup>124</sup> T-148-CONF-FRA-CT, p. 17, line 23.

<sup>125</sup> T-148-CONF-FRA-CT, p. 33, line 24, to p. 34, line 4. The witness stated that he gave the Office of the Prosecutor the wrong date of birth when interviewed in July 2005.

<sup>126</sup> EVD-D01-01031.

<sup>127</sup> EVD-D01-01103.

<sup>128</sup> T-148-CONF-FRA-CT, p. 17, line 23.

<sup>129</sup> ICC-01/04-01/06-2270-Conf-Exp-Anx1.

111. The witness therefore provided at least four different dates of birth. That in itself is sufficient for no credibility to be attached to the statements of that witness.
112. Likewise, no credibility can be attached to the statements of Witness W-0008 as to his age, since these statements are contradictory. When giving evidence, he stated that he was born in [REDACTED] on [REDACTED] 1989,<sup>131</sup> whereas between 2005 and 2008, he told the Office of the Prosecutor and the Registry of the Court that he was born in [REDACTED] on [REDACTED] 1991.<sup>132</sup> The witness's voting card, which he acknowledged as being his own, indicates that he was born on [REDACTED] 1987.<sup>133</sup>
113. As regards the excerpts from the IEC database admitted into the record of the case (EVD-D01-01031 and EVD-D01-01028), the witnesses stated on 15 November 2010 that they had given the authorities false information so that this official document would be issued.<sup>134</sup> The explanations provided by W-0007 in this regard are highly implausible:
- The Defence notes that W-0007 had in his possession two student cards for the years 2007-2008 and 2008-2009; containing information revealed for the first time when D01-0012 was giving evidence.<sup>135</sup>
  - W-0007, appearing under the name of [REDACTED] ([REDACTED]), certified the accuracy of the information appearing on his two student

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<sup>130</sup> EVD-OTP-00655.

<sup>131</sup> T-135-CONF-FRA-CT2, p. 4, line 22, to p. 5, line 2.

<sup>132</sup> Application form to participate in the proceedings, ICC-01/04-01/06-217-Conf-Exp, attestation of the birth of a child, EVD-D01-00055, and statement referred to in T-137-CONF-FRA-CT, p. 12, lines 17-20.

<sup>133</sup> See excerpt of the IEC database, EVD-D01-01028. See also the statement on the voting card, EVD-OTP-00658.

<sup>134</sup> EVD-OTP-00655 (W-0007) and EVD-OTP-00658 (W-0008).

<sup>135</sup> Surname and first name of W-0007: T-248-CONF-FRA-CT, p. 27, lines 6-7; his year of birth: *idem*, p. 40, lines 1-4; the fact that W-0007 had studied in [REDACTED]: T-248-CONF-FRA-CT, p. 46, lines 23-25.

cards for 2007-2008 and 2008-2009. However, neither of those two student cards mention the name “[REDACTED]”.

- The signature of W-0007 on his statement of 15 November 2010 starts with the letter “[REDACTED]”. However, the victim’s signature on his written statement dated 2005 and on his application form to participate in the proceedings as a victim clearly starts with the letter “[REDACTED]”.<sup>136</sup>
- The statement of Witness W-0007 that any person, even a minor, not holding a voting card in 2005 (the year of issue of the voting card) would be considered a foreigner or a member of a militia and would be arrested appears to be manifestly unfounded.

114. The explanations provided by W-0008 on 15 November 2010 are all similarly implausible.<sup>137</sup>

- W-0008, appearing as [REDACTED], certified that the information on his voting card issued in 2009 is correct.<sup>138</sup> However, that voting card shows a different name, that is to say, [REDACTED].
- The voting card submitted by the witness shows the name “[REDACTED]”.<sup>139</sup> However, when giving evidence, a/0048/06 failed to mention the name “[REDACTED]”. Furthermore, that name did not appear in any of the documents disclosed by the Prosecutor to the Defence in connection with that witness.
- The Defence submits that Witness W-0008’s claim that a minor would have to hold a voting card in order to move around in Bunia at night

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<sup>136</sup> See, for example, ICC-01/04-01/06-216-Conf-Exp, p. 17/27.

<sup>137</sup> EVD-OTP-00658.

<sup>138</sup> EVD-OTP-00659.

<sup>139</sup> EVD-OTP-00659.

without being arrested in 2005 (the year of issue of the first voting card) is manifestly unfounded.

- The signature of Witness W-0008 on the statement<sup>140</sup> starts with the letter “[REDACTED]”, which was not the case for his signature on his application form to participate in the proceedings.<sup>141</sup>

115. The Defence is of the view that the content of these statements should be accorded only low probative value, since the Defence did not have an opportunity to cross-examine the witnesses in this regard. On that matter, the Defence refers to its observations filed on 10 January 2011.<sup>142</sup>

116. In any event, these statements demonstrate, at the very least, that Witnesses W-0007 and W-0008 had already lied about their age in the past.

117. Lastly, the Prosecutor<sup>143</sup> still does not accept that, in 2003, W-0007 was at least 15 years old. The Prosecutor has attempted to cast doubt on the evidence of his own witness, contrary to the witness’s statements and documents which the Prosecutor himself tendered into evidence.<sup>144</sup>

*- Their school attendance and places of residence*

118. The school records of W-0007 and W-0008 filed as evidence show that, contrary to their statements, they were not in [REDACTED] during the 2001-2002 academic year or at the beginning of the 2002-2003 academic year, but were both in school in [REDACTED] during that period.<sup>145</sup>

119. Serious inconsistencies can be seen between the evidence of W-0007 and W-0008 and the statements of their parents concerning the place of residence of

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<sup>140</sup> EVD-OTP-00658.

<sup>141</sup> ICC-01/04-01/06-217-Conf-Exp, p. 17/30.

<sup>142</sup> See ICC-01/04-01/06-2671-Conf. See also ICC-01/04-01/06-2694-Corr, para. 24.

<sup>143</sup> ICC-01/04-01/06-2748-Conf, paras. 416-417.

<sup>144</sup> EVD-OTP-00655 and EVD-OTP-00656 and EVD-OTP-00657.

<sup>145</sup> EVD-D01-00181, p. [REDACTED]; EVD-D01-00182, p. [REDACTED]; EVD-D01-00183, p. [REDACTED].

Witnesses W-0007 and W-0008,<sup>146</sup> and the place from which they claim to have been abducted by UPC soldiers.<sup>147</sup>

120. Furthermore, in his additional statement, W-0007 stated that, from the age of 11 years, he had lived at the home of [REDACTED] in [REDACTED]. He added that he was at that time in the fourth year of primary school.<sup>148</sup> That statement contradicts his evidence before the Chamber.<sup>149</sup>

*- The circumstances in which the witnesses were enlisted and their military activities*

121. The numerous contradictions, inconsistencies and implausibilities in the statements of W-0007 and W-0008 and those of their parents show that they were never enlisted into the armed forces of the UPC.

#### W-0007

122. W-0007 stated that he was enlisted early in 2003,<sup>150</sup> and underwent 4 weeks' initial military training in Irumu, followed by 3 or 4 months in Mandro,<sup>151</sup> after which he became a bodyguard for commander [REDACTED].<sup>152</sup> He moved in

<sup>146</sup> W-0497 stated [REDACTED]: EVD-D01-00730, pp. [REDACTED]. Witness W-0007 stated that he attended school in [REDACTED]: T-148-CONF-FRA-CT, p. 18, line 17, to p. 19, line 3, and p. 19, line 25, to p. 20, line 1. Witness W-0008 stated that he had attended school in [REDACTED]: T-135-CONF-FRA-CT, p.5, line 21, to p. 6, line 16.

<sup>147</sup> W-0497 claimed that W-0007 and W-0008 were abducted when the family was fleeing to [REDACTED], EVD-D01-00730, pp. 0170-0171, lines 421-462, and p. 0179, lines 718-719. However, W-0496 explained that at the time of the war in [REDACTED] and the children were dispersed. In [REDACTED], he discovered that the children were in the army: EVD-D01-00734, p. 0108, lines 864-874. These statements contradict the evidence of W-0007 and W-0008, who claimed to have been taken from [REDACTED], W-0007: T-148-CONF-FRA-CT, p. 19, lines 21-24. W-0008: T-135-CONF-FRA-CT, p. 10, line 14. At no point during their evidence did W-0007 and W-0008 mention the village of [REDACTED].

<sup>148</sup> EVD-D01-00753, pp. 0648-0649, lines 589-593, and p. 0637, line 188; EVD-D01-00754, pp. 0675-0676, lines 749-756.

<sup>149</sup> When giving evidence before the Chamber, the witness confirmed that he had been living with his parents when he was abducted. See, for example, T-149-CONF-FRA-CT, p. 56, lines 1-15.

<sup>150</sup> The witness stated that he was enlisted at the beginning of 2003: T-148-CONF-FRA-CT, p. 20, lines 20-21.

<sup>151</sup> T-148-CONF-FRA-CT, p. 50, lines 3-8, and T-149-CONF-FRA-CT, p. 44, lines 15-17.

<sup>152</sup> T-149-CONF-FRA-CT, p. 2, line 14, to p. 3, line 16.

with him in [REDACTED].<sup>153</sup> The witness would therefore have completed his military training in April 2003.

123. W-0007 stated that he saw Thomas Lubanga at the end of his three months' training at the Mandro camp when the weapons were handed out.<sup>154</sup> The witness claimed, furthermore, that Kahwa and Bagonza were commanders at the time.<sup>155</sup> He stated that he fought for the UPC in Dele alongside commander [REDACTED] in the battle of 6 March 2003 in Bunia against the Lendus and Ugandans.<sup>156</sup> He then fled with him to [REDACTED].<sup>157</sup> These statements are manifestly false for the following reasons:

- Commander [REDACTED] left the UPC [REDACTED] and joined [REDACTED].<sup>158</sup> [REDACTED]<sup>159</sup> in order to join [REDACTED].
- The Mandro training camp was no longer used by the UPC after the end of October 2002.<sup>160</sup>
- Thomas Lubanga fled Bunia on 5 March 2003, and later Ituri, and could not have taken part in any ceremony in Irumu upon the completion of W-0007's training.<sup>161</sup>
- Bagonza was killed in 2002.<sup>162</sup> He could not therefore have been a UPC commander in 2003.
- Chief Kahwa left the UPC movement in October/November 2002<sup>163</sup> and was no longer associated with the UPC in 2003.

<sup>153</sup> T-149-CONF-FRA-CT, p. 2, line 14, to p. 3, line 16.

<sup>154</sup> The witness stated that he was enlisted at the beginning of 2003: T-148-CONF-FRA-CT, p. 50, lines 5-8, and p. 20, lines 20-21.

<sup>155</sup> T-148-CONF-FRA-CT, p. 57, line 16, and T-149-CONF-FRA-CT, p. 7, lines 5-12.

<sup>156</sup> T-149-CONF-FRA-CT, p. 24, lines 7-23.

<sup>157</sup> T-150-CONF-FRA-CT, p. 9, lines 8-15.

<sup>158</sup> W-0055: T-178-CONF-FRA-CT, p. 61, lines 6-21; D01-0019: T-341-FRA-ET, p. 23, lines 4-16.

<sup>159</sup> W-0055: T-178-CONF-FRA-CT, p. 61, lines 6-21; D01-0019: T-341-FRA-ET, p. 23, lines 4-16.

<sup>160</sup> D01-0019: T-345-FRA-ET, p. 18, line 27, to p. 19, line 11.

<sup>161</sup> D01-0011: T-347-FRA-ET, p. 10, line 6, to p. 12, line 3.

<sup>162</sup> D01-0026: T-251-CONF-FRA-CT, p. 30, line 24, to p. 31, line 4.

- Witness W-0007 claimed to have been commander [REDACTED]'s bodyguard, as had been [REDACTED].<sup>164</sup>

124. Furthermore, Witness W-0007's statements contain many other contradictions, notably the following:

- W-0007 provided three different versions of his enlistment by UPC soldiers. Before the Chamber, he stated that he had been enlisted when he was near his school.<sup>165</sup> In 2005, the witness stated that he had been enlisted whilst he was doing his homework at home,<sup>166</sup> whereas in 2008, he told the Office of the Prosecutor that he had been "taken" from inside the school.<sup>167</sup>
- W-0007 did not mention the battle of Dele to investigators in 2005<sup>168</sup> whereas, when giving evidence, he stated that he had been wounded during this battle.<sup>169</sup>
- The witness made contradictory statements regarding his foot wound, in particular as regards the seriousness of the wound, and the battle during which he claimed to have been wounded.<sup>170</sup>
- W-0007 claimed that Thomas Lubanga was driven in a vehicle to the Mandro training centre in 2003.<sup>171</sup> That statement is manifestly mendacious for the reasons set out in the preceding paragraph. It has also been established that vehicles were unable to reach the Mandro training camp.<sup>172</sup> When confronted with that statement, the witness retracted his evidence.<sup>173</sup>

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<sup>163</sup> D01-0019: T-340-FRA-CT, p. 44, line 23; EVD-D01-01089.

<sup>164</sup> [REDACTED]. W-0007: T-148-CONF-FRA-CT, p. 59, lines 3-4.

<sup>165</sup> T-148-CONF-FRA-CT, p. 21, lines 9-10, and T-149-CONF-FRA-CT, p. 72, lines 21-22.

<sup>166</sup> T-149-CONF-FRA-CT, p. 75, lines 17-25.

<sup>167</sup> T-149-CONF-FRA-CT p. 74, line 21, to p. 75, line 7.

<sup>168</sup> T-150-CONF-FRA-CT, p. 10, line 11, to p. 13, line 21.

<sup>169</sup> T-149-CONF-FRA-CT, p. 24, lines 7-15.

<sup>170</sup> T-150-CONF-FRA-CT, p. 16, line 6, to p. 19, line 20.

<sup>171</sup> T-149-CONF-FRA-CT, p. 84, lines 9-19.

<sup>172</sup> See, for example, W-0016: T-191-CONF-FRA-CT, p. 35, lines 10-25.

<sup>173</sup> T-149-CONF-FRA-CT, p. 87, lines 6-14.

- When giving evidence, Witness W-0007 provided an explanation which was fundamentally different from that provided in 2005 concerning the purpose of his journey to Fataki in 2003.<sup>174</sup>
- When giving evidence, the witness denied having found his brother W-0008 in Fataki and having gone to the [REDACTED] centre with him, contrary to what he had stated in 2005 during his interview with investigators from the Office of the Prosecutor.<sup>175</sup>
- Lastly, the witness stated that he fought for the first time at Bogoro,<sup>176</sup> contrary to what he had stated in 2005.<sup>177</sup>

W-0008

125. Witness W-0008's account contains many inconsistencies, implausibilities and contradictions, notably the following:

- The witness claimed that it was possible to recognize the ranks of UPC commanders through distinctive insignia, such as colours and stars.<sup>178</sup> The evidence admitted into the record of the case demonstrates the contrary.<sup>179</sup>
- The witness claimed that Kahwa and Bagonza were commanders at the time when he stated that he was a member of the UPC, that is, in early 2003.<sup>180</sup> This information is manifestly false, since Bagonza had been killed in 2002<sup>181</sup> and Chief Kahwa had left the UPC movement in October/November 2002.<sup>182</sup>

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<sup>174</sup> T-150-CONF-FRA-CT, p. 12, line 20, to p. 13, line 9.

<sup>175</sup> T-150-CONF-FRA-CT, p. 29, lines 9-25.

<sup>176</sup> T-149-CONF-FRA-CT, p. 9, line 25, to p. 10, line 5.

<sup>177</sup> T-150-CONF-FRA-CT, p. 18, line 25, to p. 20, line 7.

<sup>178</sup> T-137-CONF-FRA-CT, p. 53, lines 7-8, and p. 54, lines 6-7.

<sup>179</sup> W-0002 explained that the individuals appearing in photograph EVD-OTP-00727 are soldiers from RCD-Goma since, in Ituri at the time, no one had a rank: T-162-CONF-FRA-CT, p. 86, lines 5-16. W-0017: T-158-CONF-FRA-CT, p. 68, line 23, to p. 69, line 8.

<sup>180</sup> T-135-CONF-FRA-CT2, p. 41, lines 12-22, and T-137-CONF-FRA-CT, p. 69, line 16, to p. 70, line 9.

<sup>181</sup> D01-0026: T-251-CONF-FRA-CT, p. 30, line 24, to p. 31, line 4.

<sup>182</sup> D01-0019: T-340-FRA-CT, p. 44, line 23; EVD-D01-01089.

- Contrary to W-0008's allegations, it would appear unlikely that there were any bombs or rocket launchers amongst the weapons parachuted into Mandro.<sup>183</sup>
- W-0008 claimed that in 2003 he was asked to train recruits at the [REDACTED] camp,<sup>184</sup> whereas it has been demonstrated that the [REDACTED] training camp [REDACTED].<sup>185</sup>
- W-0008 stated that he travelled between [REDACTED] and the Irumu camp by car and that the drive took approximately 2 hours.<sup>186</sup> However, in July 2005 he had told investigators from the Office of the Prosecutor that he had walked to the camp and "[TRANSLATION] didn't walk very far".<sup>187</sup>
- The witness stated that he underwent military training in the FPLC for 2 weeks,<sup>188</sup> contrary to what he told investigators in July 2005.<sup>189</sup>
- W-0008 was unable to clarify whether or not he saw his cousin at the Irumu camp and whether his cousin had been enlisted at the same time as he.<sup>190</sup>
- In 2005, W-0008 stated that he had taken part only in the Lipri battle,<sup>191</sup> whereas in his evidence, he stated that he had fought at Barrière.<sup>192</sup>

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<sup>183</sup> T-135-CONF-FRA-CT2, p. 48, lines 11-20.

<sup>184</sup> T-135-CONF-FRA-CT2, p. 52, line 20, to p. 53, line 3.

<sup>185</sup> D01-0019: T-345-FRA-ET, p. 18, line 27, to p. 19, line 11.

<sup>186</sup> T-135-CONF-FRA-CT2, p. 10, lines 13-21, and p. 11, lines 7-10 and T-137-CONF-FRA-CT, p. 42, lines 12-14.

<sup>187</sup> See T-137-CONF-FRA-CT, p. 42, line 15, to p. 44, line 10.

<sup>188</sup> T-135-CONF-FRA-CT2, p. 30, line 8.

<sup>189</sup> The witness had stated that he had undergone two months' training: T-137-CONF-FRA-CT, p. 50, lines 3-20.

<sup>190</sup> T-137-CONF-FRA-CT, p. 58, lines 7-24.

<sup>191</sup> T-137-CONF-FRA-CT, p. 77, lines 2-24.

<sup>192</sup> T-135-CONF-FRA-CT2, p. 25, lines 14-16.

- The witness claimed to have pillaged the village of Lipri after the fighting, despite having sustained a wound to the heel that had required surgery. He also contradicted himself as regards the seriousness of the wound.<sup>193</sup>
- The witness stated that he spent only one day in Mandro,<sup>194</sup> whereas in 2005, he stated that he had remained there for 2 months, during which time he engaged in various activities.<sup>195</sup>
- When giving evidence, W-0008 stated that whilst he was a soldier in the FPLC, he had attended only one meeting at Bunia stadium at which President Thomas Lubanga was present;<sup>196</sup> however, in 2005, he stated that he had attended meetings held by Thomas Lubanga at Bunia stadium, but that this was before his enlistment in the FPLC.<sup>197</sup> He also claimed that Thomas Lubanga had arrived in a vehicle, standing up.<sup>198</sup> However, video EVD-OTP-00571,<sup>199</sup> recorded at the time of the only meeting at the Bunia stadium, shows Thomas Lubanga arriving in a closed vehicle.

W-0496 and W-0497

126. Contrary to the Prosecutor's assertions, the evidence given by the parents of Witnesses W-0007 and W-0008 does not corroborate these witnesses' evidence; the parents' statements are confused, inaccurate, and essentially contradictory to those of their children.

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<sup>193</sup> T-137-CONF-FRA-CT, p. 73, line 11, to p. 76, line 17.

<sup>194</sup> T-135-CONF-FRA-CT2, p. 53, line 24, to p. 54, line 1.

<sup>195</sup> T-138-CONF-FRA-CT, p. 5, line 9, to p. 6, line 13.

<sup>196</sup> T-135-CONF-FRA-CT2, p. 42, lines 7-11, and p. 43, lines 2-4; T-138-CONF-FRA-CT, p. 2, line 19, to p. 3, line 2.

<sup>197</sup> T-138-CONF-FRA, p. 3, line 6, to p. 4, line 5.

<sup>198</sup> T-138-CONF-FRA-CT, p. 4, lines 6-19.

<sup>199</sup> Excerpt: 02:22:37 to 2:23:11. W-0030: T-128-CONF-FRA-CT, p. 50, lines 14-18 (town stadium).

127. For example, W-0496 was unable to answer investigators' questions as to the age of W-0007 and W-0008,<sup>200</sup> who themselves indicated that it was their parents who enrolled them in school. W-0007 also specified that it was his parents who had provided his date of birth during his school enrolment.<sup>201</sup> The enrolment register of [REDACTED] thus indicates that W-0007 was born on [REDACTED] 1987 and that W-0008 was born on [REDACTED] 1989.<sup>202</sup>
128. Furthermore, the mother's statements in this regard are manifestly mendacious: she stated that there is less than 8 years' difference in age between [REDACTED] and both W-0007 and W-0008.<sup>203</sup> However, [REDACTED] was born in [REDACTED],<sup>204</sup> which would mean that W-0007 and W-0008 were born before 1982.
129. Moreover, Witness W-0496, the father of W-0007 and W-0008, stated that his children were in a camp near [REDACTED] and that he had seen them jogging in that area.<sup>205</sup> However, at no point in their evidence did W-0007 and W-0008 mention the village of [REDACTED], or having been in a camp close to [REDACTED].
130. The parents' evidence is contradicted by that of D01-0012 [REDACTED], who stated that he joined the ranks of the UPC from the beginning of the material period and remained there until the arrival of the French.<sup>206</sup> He stated that he was never told that [REDACTED] had been soldiers. D01-0012 maintained that [REDACTED] were not soldiers when he joined the UPC army and that after he

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<sup>200</sup> W-0496: EVD-D01-00733, pp. 066-0067, lines 865-872. The Prosecutor did not put the question directly to Witness W-0497.

<sup>201</sup> W-0008: T-137-CONF-FRA-CT, p. 20, lines 20-21; W-0007: T-149-CONF-FRA-CT, p. 36, line 4. He stated that he saw his date of birth on his school records: T-148-CONF-FRA-CT, p. 17, line 24, to p. 18, line 2.

<sup>202</sup> EVD-D01-00183, p. 4574, #744/02 and 745/02.

<sup>203</sup> EVD-D01-00729, pp. 0140-0141, line 1026 and lines 1032-1061: she said that when [REDACTED] was almost 8 years old, W-0007 was one and a half years old and W-0008 was a baby.

<sup>204</sup> [REDACTED].

<sup>205</sup> EVD-D01-00734, p. 0109, lines 902-913, and EVD-D01-00736, p. 0164, line 365.

<sup>206</sup> [REDACTED].

left the UPC, no one had informed him that [REDACTED] had been soldiers.<sup>207</sup> Although W-0008 claimed the contrary,<sup>208</sup> [REDACTED].<sup>209</sup>

131. D01-0012 contradicted the statement that W-0496 is not [REDACTED] biological father.<sup>210</sup> He provided clarification as to certain names which Witnesses W-0007 and W-0008 had attributed to other people.<sup>211</sup>
132. In order to conceal the truth, W-0008 claimed not to have told [REDACTED] that he was in the army,<sup>212</sup> a statement contradicted by W-0007.<sup>213</sup>
133. As regards Witnesses W-0007 and W-0008 having been mentioned in a document submitted as a register of the centre managed by W-0031, the Defence emphasises the unreliability of the information mentioned in that register, since such information had clearly not been verified.<sup>214</sup> For example, it erroneously indicates that W-0008 is of the Alur ethnic group,<sup>215</sup> whereas he is [REDACTED].<sup>216</sup>

*- Credibility of Witnesses W-0007 and W-0008*

134. It has been shown that, since 2005, Witnesses W-0007 and W-0008 have lied persistently to the Office of the Prosecutor, to the IEC authorities and to the Registry of the Court and continued to lie when giving evidence before the Court. Their statements can therefore be accorded no credibility.
135. When confronted with certain inconsistencies in his various statements, W-0007 stated during his evidence that he had not told the truth in the past as he

<sup>207</sup> [REDACTED].

<sup>208</sup> EVD-D01-00751, p. 0414, lines 81-87.

<sup>209</sup> [REDACTED]; W-0007: EVD-D01-00754, pp. 0658-0659, lines 79-142.

<sup>210</sup> T-248-CONF-FRA-CT, p. 24, line 3, p. 25, lines 18-24, and p. 32, lines 21-23. See ICC-01/04-01/06-2748-Conf, para. 409, footnote 1194.

<sup>211</sup> T-248-CONF-FRA-ET, p. 33, line 23, to p. 36, line 2. (e. g. [REDACTED], [REDACTED], etc.)

<sup>212</sup> EVD-D01-00751, p. 0423, lines 396-398.

<sup>213</sup> EVD-D01-00754, pp. 0665-0668, lines 370-474.

<sup>214</sup> *Infra*, paras. 618-637.

<sup>215</sup> EVD-OTP-00474, p. 0510.

<sup>216</sup> T-148-CONF-FRA-CT, p. 18, line 5.

had been afraid when he met with the investigators from the Office of the Prosecutor. He added: “[TRANSLATION] When we realised that it was something to be taken seriously, then we started to tell the truth.”<sup>217</sup> If true, this excuse could not have been validly advanced again in January 2010, when Witness W-0007 explained why he had lied to the Court about his family relationship with W-0008.<sup>218</sup>

136. Furthermore, not only did the witness fail to provide certain information, but he also provided false information. That excuse does not explain why the witness made mendacious statements<sup>219</sup> and persisted in his mendaciousness.
137. Moreover, these explanations in no way justify the two individuals’ perjury before the Court.
138. In addition, these explanations do not withstand scrutiny.
139. Although the witnesses were under the protection of the Court and had been assisted by a lawyer for several years by the time they appeared before the Chamber, they nevertheless continued to lie under oath. Nothing explains how claiming to be cousins could afford the witnesses greater security than if they had stated the real nature of their family relationship.
140. It should be noted that Witness W-0008 specifically stated that it was not for reasons of security that he had replied, on the subject of his brothers and sisters, “[TRANSLATION] I forget their names”.<sup>220</sup> The witness cannot then, one year later, rely on that excuse.

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<sup>217</sup> T-149-CONF-FRA-CT, p. 76, lines 5-16.

<sup>218</sup> EVD-D01-00752, pp. 0625-0626, lines 624-689.

<sup>219</sup> For example: T-149-CONF-FRA-CT, p. 94, lines 8-21.

<sup>220</sup> T-137-CONF-FRA-CT, p. 13, lines 4-15 and T-138-CONF-FRA-CT, p. 37, lines 7-11.

- *Credibility of Witnesses W-0496, W-0497 and D01-0012*

141. Contrary to the Prosecutor's argument, D01-0012 clearly stated that at no time had he felt under pressure as a result of Mr Dieudonné Mbuna's visit.<sup>221</sup> The only pressure brought to bear on the witness came from members of his family who tried to dissuade him from giving evidence for the Defence.<sup>222</sup>
142. As regards Witnesses W-0496 and W-0497, the manifest mendaciousness of their statements means that no credibility can be attached to their allegations.

- *Witness W-0007's status as victim*

143. Only direct victims of the crimes with which Mr Thomas Lubanga has been charged are authorized to participate in the proceedings, that is to say, children under the age of 15 years who are able to prove *prima facie* that they were enlisted into the FPLC during the period of the charges confirmed by the Pre-Trial Chamber, that is, between September 2002 and 13 August 2003.
144. On the basis of the witness's statements that he was aged 12 years when he was enlisted in 2003 (form a/0047/06), the Chamber considered that the witness had provided sufficient evidence to establish that he was a victim within the meaning of rule 85(a).<sup>223</sup>
145. However, when giving evidence, W-0007 admitted having been born on [REDACTED] 1987 and claimed to have been enlisted in early 2003.<sup>224</sup> He was therefore aged 15 years when he was allegedly enlisted.
146. Consequently, the victim status granted to Witness W-0007 should be withdrawn.

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<sup>221</sup> T-249-CONF-FRA-CT2, p. 10, lines 8-11.

<sup>222</sup> T-248-CONF-FRA-CT, p. 49, lines 19-23, and p. 50, lines 7-18.

<sup>223</sup> ICC-01/04-01/06-1556-Conf, Annex A2, ICC-01/04-01/06-1563, pp. 56/289 *et seq.*

<sup>224</sup> T-148-CONF-FRA-CT, p. 17, line 23, and p. 21, lines 1-4.

147. Lastly, it should be noted that the legal representatives themselves refer to the low probative value of the birth certificates of W-0007 and W-0008,<sup>225</sup> even though these were the only documents annexed as proof of their ages to their application to participate as victims.<sup>226</sup> The same is true for Witnesses W-0010 and W-0011.

## 2.2 DRC-OTP-WWWW-0010 ([REDACTED])

148. The Defence refers to its observations concerning Witness W-0010 at paragraphs 166 to 168 of its "Application Seeking a Permanent Stay of the Proceedings",<sup>227</sup> and wishes to add the following observations:

149. Firstly, the testimonial and documentary evidence given in the proceedings shows that W-0010 made mendacious statements before the Chamber in respect of the material elements of her evidence, such as her age, her school attendance, the circumstances surrounding her enlistment, and her presence within the APC.

150. Secondly, as shown below, the evidence of D01-0005 and D01-0006 is consistent and corroborated by the documentary evidence and, on essential points, even by the evidence of W-0010.

### *- Her age at the time of her enlistment into the UPC*

151. The evidence shows that W-0010 lied about her age, and that she was aged more than 15 years when she was enlisted into the FPLC:

- EVD-D01-00762 is W-0010's voting card, which gives her date of birth as [REDACTED] 1986.<sup>228</sup> The authenticity of this document is established by the extract from the IEC database.<sup>229</sup>

<sup>225</sup> ICC-01/04-01/06-2744-Conf-tENG, para. 33.

<sup>226</sup> W-0007: EVD-D01-01103. W-0008: EVD-D01-00055. Concerning the fact that W-0143 had them issued, see metadata.

<sup>227</sup> ICC-01/04-01/06-2657-Conf-tENG.

<sup>228</sup> W-0010 recognized voting card EVD-OTP-00660.

- Witnesses D01-0005 and D01-0006, [REDACTED],<sup>230</sup> confirmed that W-0010 was not under the age of 15 years in 2002: D01-0005 stated that W-0010 told him that she was born in 1985<sup>231</sup> and D01-0006 confirmed that W-0010 was born in 1985 or 1986.<sup>232</sup>
- EVD-D01-00082, a document prepared by Witness W-0046, indicates 1987 as the date of birth.

152. The witness's statements in this regard are themselves contradictory:

- EVD-D01-00218, the application form to participate as a victim signed by W-0010, bears the date of [REDACTED] 1988<sup>233</sup> and indicates that she was enlisted at the age of "[TRANSLATION] barely 15 years old".<sup>234</sup>
- EVD-D01-01102, Witness W-0010's birth certificate, which she submitted as an attachment to her application to participate as a victim, bears the date of [REDACTED] 1988.

153. No document or testimony corroborates the witness's statement that she was born in 1989.

154. As regards the voting card admitted into the record of the case,<sup>235</sup> the witness stated on 15 November 2010<sup>236</sup> that she had provided false information to the authorities in order to obtain this official document. The explanations provided by W-0010 in this regard are highly implausible:

- She stated that she was issued with the voting card when she left the UPC army whilst the French soldiers were in Bunia, that is to say,

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<sup>229</sup> EVD-D01-01005.

<sup>230</sup> Witnesses D01-0005: T-261-CONF-FRA-CT, p. 16, line 23, to p. 17, line 12 and D01-0006: T-254-CONF-FRA-CT, p. 44, line 21, to p. 45, line 2, both recognized W-0010 on photograph EVD-D01-00112.

<sup>231</sup> T-261-CONF-FRA-CT, p. 18, lines 1-4.

<sup>232</sup> T-254-CONF-FRA-CT, p. 63, lines 20-23, and p. 43, lines 9-10.

<sup>233</sup> EVD-D01-00218, p. 0257.

<sup>234</sup> EVD-D01-00218, p. 0263; T-145-CONF-FRA-CT, p. 58, lines 2 *et seq.*

<sup>235</sup> EVD-D01-00762.

<sup>236</sup> EVD-OTP-00660.

between June and September 2003. However, the card was issued in 2005, as stated in the IEC database.<sup>237</sup>

- W-0010 claimed that she needed to obtain an identity card so as not “[TRANSLATION] to be arrested”. However, she could easily have obtained another official document such as an attestation of birth of a child (see document EVD-D01-01102, issued in 2005).
- W-0010 claimed not to recognize the voting card but remembered having her photograph taken. However, in that same statement,<sup>238</sup> she contradicted herself when describing the circumstances in which she obtained that same voting card.
- W-0010 stated that she was aged 17 years when the voting card was issued. As that card was issued on [REDACTED] 2005,<sup>239</sup> W-0010 could not have been born in [REDACTED] 1989, contrary to what she said when giving evidence.<sup>240</sup>

155. The excerpt from the document entitled “[REDACTED]”<sup>241</sup> was acknowledged by Ms Kristine Peduto as being her “[TRANSLATION] written notes of the interview”.<sup>242</sup> Those notes therefore constitute an account of what [REDACTED], daughter of a man named [REDACTED], reported to a MONUC employee in 2003 as regards her personal situation.

156. Although Witness W-0010 denied having met a MONUC employee,<sup>243</sup> Witness D01-0005 reported having gone with W-0010 to the NGO [REDACTED]<sup>244</sup> in

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<sup>237</sup> EVD-D01-01005.

<sup>238</sup> See EVD-OTP-00660, paras. 2 and 4.

<sup>239</sup> EVD-D01-01005.

<sup>240</sup> T-144-CONF-FRA-CT, p. 12, lines 12-15.

<sup>241</sup> EVD-D01-00082.

<sup>242</sup> T-208-CONF-FRA-ET, p. 49, lines 4-9.

<sup>243</sup> T-145-Conf-FRA-CT, p. 72, lines 9-12.

<sup>244</sup> T-261-CONF-FRA-CT, p. 25, lines 7-10.

2005,<sup>245</sup> and having met a white person from MONUC to whom she spoke.<sup>246</sup> She claimed that she did not tell that person the truth.<sup>247</sup> That interview was recorded in the same document as excerpt EVD-D01-00082.<sup>248</sup>

*- Her school attendance*

157. The witness claimed to have studied until the 4<sup>th</sup> year of primary school, at the [REDACTED], and to have interrupted her studies because she joined the forces of the UPC.<sup>249</sup> That information is contradicted by the enrolment register of [REDACTED],<sup>250</sup> which shows that in 2002, W-0010 was not enrolled there.
158. Furthermore, her presence in the ranks of the APC between 1999 and 2002, demonstrated below, makes it impossible for her to have been attending the [REDACTED] between 1999 and 2002.

*- Her presence in the APC forces and the circumstances surrounding her enlistment*

159. The evidence presented before the Chamber shows that W-0010 was enlisted into the APC in 1999, and that she remained there until she was integrated into the FPLC:
- EVD-D01-00082: this document was prepared by Ms Kristine Peduto following an interview of [REDACTED] by one of her colleagues.<sup>251</sup> It is recorded therein that W-0010 was forcibly recruited in [REDACTED] by APC units towards the end of 1999; that she subsequently underwent military training in Rwampara, and that she fought under the orders of commander [REDACTED]. It is further stated therein that W-0010 was

<sup>245</sup> T-261-CONF-FRA-CT, p. 39, lines 24-25.

<sup>246</sup> T-261-CONF-FRA-CT, p. 30, lines 9-11.

<sup>247</sup> T-261-CONF-FRA-CT, p. 30, lines 21-23.

<sup>248</sup> EVD-D01-00756. This document, like EVD-D01-00082, is an excerpt from the document "[REDACTED]" dated 26/03/2003 of which Ms Kristine Peduto is one of the authors.

<sup>249</sup> T-144-CONF-FRA-CT, p. 12, line 25, to p. 14, line 1.

<sup>250</sup> EVD-D01-00180. D01-0029: T-294-FRA-CT, p. 10, lines 10-13.

<sup>251</sup> Father's name [REDACTED], mother's name [REDACTED].

transferred to [REDACTED] in late 2001 and that at the time of the UPC attack on [REDACTED] in 2002, she joined the UPC under the orders of commander [REDACTED], then fought alongside commander [REDACTED]. She subsequently left the UPC in July 2003.

- Witnesses D01-0006 and D01-0005 stated that they knew W-0010 when she was a soldier in the APC and was living in [REDACTED].<sup>252</sup> D01-0006, at the time a UPC soldier, stated that W-0010 joined the ranks of the UPC after the UPC had arrived in [REDACTED]. W-0010 was then taken to [REDACTED] for ideological training.<sup>253</sup> This version is consistent with the one provided by Witness W-0010 during a meeting with a MONUC employee in 2003.<sup>254</sup>

160. The mendaciousness of the statement made by W-0010 as to the circumstances surrounding her enlistment is confirmed by the significant contradictions between the witness's various statements concerning the circumstances of her alleged abduction by UPC soldiers. For example:

- W-0010 successively provided three different versions of when she was enlisted. First, she stated that she was enlisted in 2002 during a battle between the UPC and the Lendus,<sup>255</sup> but added that that battle was not the one during which the UPC took Bunia.<sup>256</sup> However, in her statement of September 2005, W-0010 had stated the opposite.<sup>257</sup> Furthermore, in an additional statement which she signed on 5 October 2007 (in the same circumstances as EVD-OTP-00660), W-

<sup>252</sup> D01-0005: T-261-CONF-FRA-CT, p. 17, lines 18-25. D01-0006: T-254-CONF-FRA-ET, p. 49, line 14, to p. 51, line 8.

<sup>253</sup> T-254-CONF-FRA-CT, p. 47, lines 4-10, and p. 51, lines 11-14.

<sup>254</sup> EVD-D01-00082.

<sup>255</sup> T-144-CONF-FRA-CT, p. 17, lines 17-22, and T-145-CONF-FRA-CT, p. 53, line 16, to p. 56, line 11.

<sup>256</sup> T-145-CONF-FRA-CT, p. 4, lines 4-7.

<sup>257</sup> Reading of the statement of 2005 (DRC-OTP-0126-0122, paras. 21-22) put to the witness: T-145-CONF-FRA-CT, p. 54, line 8, to p. 56, line 11.

0010 stated that she had been enlisted in January 2003, that is to say, six months after Bunia had been taken.<sup>258</sup>

- The place of her enlistment: In her application to participate in the as a victim, W-0010 stated that she had been enlisted at the Bunia town stadium.<sup>259</sup> However, when giving evidence before the Chamber, the witness stated that she had been enlisted on the Dele road.<sup>260</sup>
- The witness provided two completely contradictory versions as regards the training camps which she claimed to have attended: in the additional statement she signed on 5 October 2007 (in the same circumstances as EVD-OTP-00660), W-0010 stated that she had been sent to the Mandro training centre, where she stayed for two weeks, before being sent to Rwampara for two weeks. She then claimed to have returned to Mandro to be issued with a weapon.<sup>261</sup> However, when giving evidence, W-0010 stated that she had first been sent to Rwampara where she had been given two weeks' training, and later to Mandro for two weeks. She claimed to have then been taken back to Rwampara where she was issued with a weapon.<sup>262</sup>

161. Furthermore, the numerous contradictions, inconsistencies and implausibilities concerning her alleged military activities within the armed wing of the UPC, generally evident in her testimony and in her post-testimony statement to investigators from the Office of the Prosecutor, support the argument that the witness was lying about the actual circumstances of her integration into the armed forces of the UPC.

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<sup>258</sup> EVD-D01-00218, p. 0281, question 2.

<sup>259</sup> EVD-D01-00218, p. 0264.

<sup>260</sup> T-144-CONF-FRA-CT, p. 20, lines 8-12; T-145-CONF-FRA-CT, p. 57, line 12, to p. 58, line 1.

<sup>261</sup> EVD-D01-00218, p. 0281, question 2.

<sup>262</sup> T-144-CONF-FRA-CT, p. 14, line 12, to p. 15, line 13.

162. For example:

- As to the period during which she claimed to have been in the FPLC: in her application to participate as a victim, W-0010 stated that she was enlisted into the UPC during the period between January and December 2003.<sup>263</sup>
- She claimed that commander Pepe was in charge of the camp at Rwampara. However, it is a matter of public knowledge that commander Pepe had died in Beni in 2001 whilst he was in the APC.<sup>264</sup> Moreover, D01-0006 stated that W-0010 told him that she had been trained at the APC camp in [REDACTED] in 1999 by commander [REDACTED].<sup>265</sup>
- W-0010 stated that, upon completion of her training, she was selected in Rwampara by commander [REDACTED] to be his bodyguard,<sup>266</sup> thus contradicting what she had said during her interview with the Office of the Prosecutor in September and October 2005. At that time, she had said that she had been selected by commander [REDACTED] after she had taken part in fighting in Libi and Mbau.<sup>267</sup>
- When giving evidence, she claimed that she had gone to hospital for treatment after having been wounded at the battle of [REDACTED].<sup>268</sup> However, she claimed the contrary in her signed statement of 5 October 2007.<sup>269</sup>

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<sup>263</sup> EVD-D01-00218, p. 0263.

<sup>264</sup> W-0010: T-144-CONF-FRA-CT, p. 25, lines 10-14, and T-145-CONF-FRA-CT, p. 63, lines 4-7. D01-0006: T-254-CONF-FRA-ET, p. 63, lines 13-18; D01-0037: T-349-FRA-ET, p. 17, lines 1-4; D01-0007: T-348-FRA-ET, p. 23, lines 12-15.

<sup>265</sup> T-254-CONF-FRA-CT, p. 60, lines 3-14.

<sup>266</sup> T-145-CONF-FRA-CT, p. 65, line 1, to p. 66, line 6.

<sup>267</sup> Reading of the statement: T-145-CONF-FRA-CT, p. 66, line 7, to p. 68, line 4.

<sup>268</sup> T-144-CONF-FRA-CT, p. 58, line 11, to p. 59, line 8.

<sup>269</sup> EVD-D01-00218, p. 0281, question 2, para. 3.

- Moreover, the witness refers to her participation in fighting which, as is generally known, occurred in 2001.<sup>270</sup>

163. After having given evidence before the Chamber on 5 and 6 March 2009, Witness W-0010 was again interviewed by the Prosecutor.<sup>271</sup> On that occasion, she confirmed certain information given in evidence by Defence Witness D01-0005, in particular the following:

- W-0010 confirmed knowing D01-0005 and having [REDACTED].<sup>272</sup> That statement confirmed the evidence of D01-0005 in that respect.<sup>273</sup>
- W-0010 confirmed that D01-0005 was not part of an armed group,<sup>274</sup> thus confirming the evidence of D01-0005,<sup>275</sup> even though they were both taken into the care of [REDACTED].<sup>276</sup>

164. Contradicting her own evidence on this point,<sup>277</sup> W-0010 stated that she knew D01-0006<sup>278</sup> and also confirmed various items of information provided by D01-0006 when he gave evidence, in particular that:

- She had been with him at [REDACTED] when she was [REDACTED]'s bodyguard,<sup>279</sup>
- D01-0006 was a soldier in the UPC.<sup>280</sup>

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<sup>270</sup> T-145-CONF-FRA-CT, p. 79, lines 17-24.

<sup>271</sup> EVD-D01-00742 and EVD-D01-00743.

<sup>272</sup> EVD-D01-00742, p. 0379, lines 127-143.

<sup>273</sup> T-261-CONF-FRA-CT, p. 20, lines 4-10.

<sup>274</sup> EVD-D01-00742, p. 0381, lines 200-218.

<sup>275</sup> T-261-CONF-FRA-CT, p. 26, lines 11-12.

<sup>276</sup> T-261-CONF-FRA-CT, p. 26, lines 15-20.

<sup>277</sup> T-145-CONF-FRA-CT, p. 76, lines 1-7.

<sup>278</sup> EVD-D01-00743, p. 0396, line 224. That information was corroborated by D01-0005: T-261-CONF-FRA-CT, p. 21, lines 3-19.

<sup>279</sup> EVD-D01-00743, p. 0396, lines 236-242. That information was corroborated by D01-0006: T-254-CONF-FRA-ET, p. 52, line 21, to p. 53, line 4.

<sup>280</sup> EVD-D01-00743, pp. 0396-0397, lines 247 and 282.

165. Lastly, the statements of D01-0006 concerning W-0010 are undeniably reliable. When giving evidence, D01-0006 provided a great deal of personal information about Witness W-0010 that he could only have known by having been [REDACTED].<sup>281</sup>
166. The Prosecutor alleges that if D01-0006 had really [REDACTED] with W-0010, D01-0005 would have known about it.<sup>282</sup> That observation is irrelevant, since at the time when D01-0005 and W-0010 [REDACTED], W-0010 and D01-0006 [REDACTED], as D01-0006 stated.

*- The benefits obtained as a result of her testimony*

167. It is worth noting that as a result of her participation as a witness, W-0010 has received numerous and significant material and financial benefits,<sup>283</sup> in particular the following:
- 2 months after having given her statement to the Office of the Prosecutor in September/October 2005, the Prosecutor paid the costs of the witness's [REDACTED];<sup>284</sup>
  - Since around 7 July 2006, the witness has been enrolled in the Court's protection programme.<sup>285</sup>

### **2.3 DRC-OTP-WWWW-0011 ([REDACTED])**

168. The Defence refers to its observations set out in paragraphs 169 to 174 of the "Defence Application Seeking a Permanent Stay of the Proceedings",<sup>286</sup> paragraph 56 of its Reply to the "Prosecution's Response to the Defence's

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<sup>281</sup> For example: D01-0006 explained that W-0010 confided in him about [REDACTED] when she was in the APC: T-254-CONF-FRA-CT, p. 61, lines 22, to p. 62, line 24.

<sup>282</sup> ICC-01/04-01/06-2748-Conf, para. 403(c).

<sup>283</sup> T-145-CONF-FRA-CT, p. 31, lines 8-20.

<sup>284</sup> EVD-D01-00847.

<sup>285</sup> ICC-01/04-01/06-978-Conf, para. 3.

<sup>286</sup> ICC-01/04-01/06-2657-Conf-tENG.

*'Requête de la Défense aux fins d'arrêt définitif des procédures'*<sup>287</sup> and, in general, paragraphs 23 and 29-45 of its Reply to the *"Réponse du Représentant légal des victimes a/0047/06, a/0048/06, a/0050/06 et a/0052/06 à la 'Requête de la Défense aux fins d'arrêt définitif des procédures datée du 10 décembre 2010'"*.<sup>288</sup>

169. The Defence wishes to submit the following additional observations:

- *The Witness's statements*

170. The Defence considers that Witness W-0011 tried to conceal his true identity, that of his family members, and his true school attendance in order to prevent the Defence from verifying any of his statements.<sup>289</sup> Furthermore, his statements are replete with contradictions and implausibilities which demonstrate that this witness was never enlisted into the UPC armed forces.

171. This observation is confirmed by documentary and testimonial evidence admitted into the record of the case which clearly demonstrates the mendaciousness of his statements.

- *Civil status of the witness*

172. In his testimony, Witness W-0011 stated that his name was [REDACTED],<sup>290</sup> son of [REDACTED] and [REDACTED],<sup>291</sup> and that he was born on [REDACTED] 1992 in [REDACTED].<sup>292</sup>

173. The following elements demonstrate the mendaciousness of these allegations:

- The witness revealed the name "[REDACTED]" for the first time in his testimony.<sup>293</sup>

<sup>287</sup> ICC-01/04-01/06-2688-Conf.

<sup>288</sup> ICC-01/04-01/06-2684-Conf.

<sup>289</sup> For example, the names of Witness W-0011 do not appear in the school documents EVD-D01-00176 and EVD-D01-00177.

<sup>290</sup> T-138-CONF-FRA-CT, p. 52, line 17.

<sup>291</sup> T-138-CONF-FRA-CT, p. 53, lines 1-4.

<sup>292</sup> T-138-CONF-FRA-CT, p. 54, line 10, and p. 53, line 23.

<sup>293</sup> T-138-CONF-FRA-CT, p. 52, line 17.

- The witness stated that the name “[REDACTED]” (or “[REDACTED]”<sup>294</sup>), which appears on his demobilization certificate attached to his application for participation, was not his name, but that of his grandfather<sup>295</sup> and that this information was provided by his maternal grandmother.<sup>296</sup> However, this name also appears in an investigator’s note dated 27 March 2008,<sup>297</sup> and in EVD-OTP-00474 mentioned by the Prosecutor ([REDACTED]).<sup>298</sup> On certain occasions, the name “[REDACTED]” is used to refer to the witness’s father instead.<sup>299</sup>
- In cross-examination, the witness stated that, apart from the name “[REDACTED]”, he could no longer remember his father’s name, which he had provided to the Court on the previous day.<sup>300</sup>
- In July 2005, the witness told investigators of the Office of the Prosecutor that he was born on [REDACTED] 1992.<sup>301</sup>

- *The witness’s school attendance*

174. He stated that he attended a school in [REDACTED] and [REDACTED] school in [REDACTED].<sup>302</sup>
175. The Prosecutor grossly misrepresents the testimony of Witness W-0011 by summarising it as follows: “W-0011 was adamant that he attended his 1<sup>st</sup>, 2<sup>nd</sup> and part of his 3<sup>rd</sup> year of primary school in [REDACTED] and that he completed his 3<sup>rd</sup> and 4<sup>th</sup> year in [REDACTED]”.<sup>303</sup>

<sup>294</sup> T-139-CONF-FRA-CT, p. 64, lines 18-19.

<sup>295</sup> T-139-CONF-FRA-CT, p. 53, lines 5-7.

<sup>296</sup> T-139-CONF-FRA-CT, p. 51, line 15, to p. 53, line 7.

<sup>297</sup> EVD-D01-01087.

<sup>298</sup> See *infra*, analysis of Witness W-0031, paras. 618-633.

<sup>299</sup> For example, EVD-D01-00059.

<sup>300</sup> T-139-CONF-FRA-CT, p. 61, line 14, to p. 32, line 13.

<sup>301</sup> T-139-CONF-FRA-CT, p. 60, lines 3-24.

<sup>302</sup> T-138-CONF-FRA-CT, p. 54, lines 17-18.

<sup>303</sup> ICC-01/04-01/06-2748-Conf, para. 389 [emphasis added].

176. On the one hand, the witness was not only incapable of clarifying many details about his school attendance,<sup>304</sup> but also made contradictory statements on several aspects such as:

- the school he attended in the 1<sup>st</sup> year;<sup>305</sup>
- the institution he attended in the 3<sup>rd</sup> year;<sup>306</sup> and
- the academic year during which he was enlisted.<sup>307</sup>

177. On the other hand, having been confronted with his contradictory statements,<sup>308</sup> the witness appeared disconcerted: “[TRANSLATION] As it is written here, I do not know what the truth is. Because when I dropped out of school, it was a long time. I do not remember the events. I do not know whether this is what is true. Perhaps I said something else today. It’s the mind...perhaps one can...a person can forget”.<sup>309</sup> He also stated: “[TRANSLATION] Since I testified, it’s been a long time. I cannot remember everything I stated. I can forget some passages.”<sup>310</sup>

178. Moreover, the enrolment register of [REDACTED] (EVD-D01-00176) shows that W-0011 was not enrolled in that school between 1998 and 2003. The enrolment register of [REDACTED] (EVD-D01-00177) shows that the witness was not enrolled in that school from 1990 to 1998.

179. The scant information revealed by the witness on this point is consequently wholly unreliable and thus undermines his credibility.

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<sup>304</sup> T-139-CONF-FRA-CT, p. 77, line 13, to p. 78, line 25.

<sup>305</sup> T-139-CONF-FRA-CT, p. 73, line 15, to p. 74, line 19, read from para. 14 of the witness statement dated July 2005.

<sup>306</sup> T-138-CONF-FRA-CT, p. 54, lines 16-22, and T-139-CONF-FRA-CT, p. 77, lines 6-11.

<sup>307</sup> T-139-CONF-FRA-CT, p. 70, lines 20-21 (he had completed his 4<sup>th</sup> year of primary school), and p. 82, line 13 (he had not completed his 4<sup>th</sup> year of primary school).

<sup>308</sup> T-139-CONF-FRA-CT, p. 70, line 13, to 76, line 21.

<sup>309</sup> T-139-CONF-FRA-CT, p. 74, lines 16-19.

<sup>310</sup> T-139-CONF-FRA-CT, p. 76, lines 4-8.

*- The witness's military activities*

180. W-0011 claimed to have enlisted<sup>311</sup> in the armed wing of the UPC in July 2002 and to have remained there until March<sup>312</sup> or July 2003.<sup>313</sup> He claimed to have undergone training for four months at Bule<sup>314</sup> and to have taken part in fighting at Lipri<sup>315</sup> and Barrière.<sup>316</sup>
181. The witness presented several inconsistent versions of each of the important elements of his testimony. For example:
- In the course of his testimony, W-0011 first stated that he left the UPC armed forces in July 2003,<sup>317</sup> and then subsequently stated that he left in March 2003.<sup>318</sup> The confusion is such that even the Prosecutor and the Legal Representative of the witness provide different dates in support of their respective positions.<sup>319</sup>
  - W-0011 stated that his friend [REDACTED] enlisted at the same time as he, contrary to what he claimed to the Office of the Prosecutor in July 2005.<sup>320</sup>
  - In July 2005, the witness told investigators of the Office of the Prosecutor that he had been enlisted in [REDACTED].<sup>321</sup> During his testimony, he mentioned the village of [REDACTED] instead.<sup>322</sup> In a bid to reconcile his two statements, the witness oddly claimed that

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<sup>311</sup> T-138-CONF-FRA-CT, p. 58, lines 13-15.

<sup>312</sup> T-140-CONF-FRA-CT, p. 19, lines 19-24.

<sup>313</sup> T-138-CONF-FRA-CT, p. 58, lines 20-22.

<sup>314</sup> T-138-CONF-FRA-CT, p. 76, lines 18-20.

<sup>315</sup> T-139-CONF-FRA-CT, p. 12, lines 10-24.

<sup>316</sup> T-139-CONF-FRA-CT, p. 7, lines 3-8.

<sup>317</sup> T-138-CONF-FRA-CT, p. 58, lines 21-22.

<sup>318</sup> T-140-CONF-FRA-CT, p. 18, line 1, to p. 20, line 3.

<sup>319</sup> ICC-01/04-01/06-2748-Conf, para. 387 and ICC-01/04-01/06-2744-Conf-tENG, para. 37.

<sup>320</sup> T-140-CONF-FRA-CT, p. 7, lines 1-23.

<sup>321</sup> T-139-CONF-FRA-CT, p. 90, line 19, to p. 92, line 22.

<sup>322</sup> T-138-CONF-FRA-CT, p. 61, line 17; T-139-CONF-FRA-CT, p. 88, lines 20-23.

[REDACTED] and [REDACTED] were one and the same place,<sup>323</sup> in contradiction to what he had already stated earlier before the judges.<sup>324</sup> Finally, he stated that he was in [REDACTED] when he was enlisted.<sup>325</sup>

- He stated that after the death of commander [REDACTED], no other officer took his place. This statement contradicts the information provided to the Prosecutor in July 2005 in which he stated that [REDACTED] had replaced him.<sup>326</sup>
- The witness stated that weapons and uniforms were distributed at the end of the training.<sup>327</sup> However, in his interview with the Prosecutor in July 2005, he had stated that he received a weapon and a uniform on the day he arrived at the camp.<sup>328</sup>
- The witness also provided information which contradicted the information he had provided during his interview of July 2005 in regard to the number of days per week devoted to training<sup>329</sup> and the obligation on recruits to take part in fighting.<sup>330</sup>
- The witness stated that the battle in Barrière was the first in which he took part, and stated that he killed for the first time during that battle. However, in his statement to the Prosecutor in July 2005, not only did he not mention any battle in Barrière, but he also stated that he fought for the first time in Lipri and killed a person for the first time there.<sup>331</sup>

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<sup>323</sup> EVD-D01-00342; EVD-D01-00060. T-139-CONF-FRA-CT, p. 91, lines 4-19.

<sup>324</sup> T-139-CONF-FRA-CT, p. 86, lines 3-10.

<sup>325</sup> T-139-CONF-FRA-CT, p. 91, line 23.

<sup>326</sup> T-140-CONF-FRA-CT, p. 51, lines 16-23, and p. 53, lines 3-15.

<sup>327</sup> T-140-CONF-FRA-CT, p. 31, lines 9-15.

<sup>328</sup> Quoted from the witness's testimony: T-140-CONF-FRA-CT, p. 31, line 19, to p. 32, line 22.

<sup>329</sup> T-140-CONF-FRA-CT, p. 35, lines 9, to p. 37, line 7.

<sup>330</sup> T-140-CONF-FRA-CT, p. 40, line 3, to p. 41, line 16.

<sup>331</sup> T-140-CONF-FRA-CT, p. 42, line 14, to p. 43, line 21.

- During his testimony, the witness stated that he left Barrière in order to move on to the battleground in Lipri, whereas he had stated in 2005 that he went to Bule, passing through Mongbwalu.<sup>332</sup>
- In July 2005, the witness had stated that he enlisted because he had learned that the Lendus had killed his mother at the [REDACTED] village market almost 6 months earlier. He added that he had never succeeded in recovering his mother's body or received any further details.<sup>333</sup> However, the witness subsequently denied having made these statements and explained that he had stated to the Prosecutor afterwards that his mother was not dead at the time he enlisted into the army.<sup>334</sup> Besides, in the Prosecutor's additional interview with Witness W-0011, the witness stated that only his mother knew that he had appeared as a witness before the Court.<sup>335</sup> This statement contradicts his statement that his mother is deceased.<sup>336</sup>
- In his additional statements of January 2010, the witness modified his account of his school attendance, the places where he had lived, and the relatives with whom he had lived.<sup>337</sup>
- Contrary to his statements before the Chamber,<sup>338</sup> Witness W-0011 stated in January 2010 that he could not remember whether or not he

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<sup>332</sup> T-140-CONF-FRA-CT, p. 50, line 4, to p. 51, line 15. The witness also denied having withdrawn to Mongbwalu during the attack, contradicting his allegations of 2005: T-140-CONF-FRA-CT, p. 52, line 1, to p. 53, line 2.

<sup>333</sup> Quoted from the witness's testimony: T-140-CONF-FRA-CT, p. 11, lines 14-25.

<sup>334</sup> T-140-CONF-FRA-CT, p. 15, lines 9-20.

<sup>335</sup> EVD-D01-00745, p. 0082, lines 1173-1175. The fact that W-0011's mother is alive was corroborated by D01-0024. T-246-CONF-FRA-CT, p. 9 lines 8-16.

<sup>336</sup> T-139-CONF-FRA-CT, p. 37, lines 8-9.

<sup>337</sup> He told the Chamber that he lived in [REDACTED] with his maternal aunt named [REDACTED]: T-139-CONF-FRA-CT, p. 72, lines 2-10. In his additional interview, W-0011 contradicted himself by stating that he lived with his parents until they separated when he was [REDACTED], and that afterwards, before the war, he lived with his grandmother from the age of [REDACTED] until he was [REDACTED]: EVD-D01-00744, p. 0044, lines 1046-1051.

<sup>338</sup> T-139-CONF-FRA-CT, p. 71, line 10, to p. 72, line 1.

had relatives in [REDACTED].<sup>339</sup> Besides, he made different, contradictory statements about his stay in [REDACTED].<sup>340</sup>

182. Furthermore, several items of information provided by W-0011 in his application to participate as a victim, which he signed, contradict his testimony as follows:

- The witness stated in his application that he enlisted in January 2003.<sup>341</sup> Subsequently, in his testimony before the Chamber, the date he provided was July 2002.<sup>342</sup>
- In his application, W-0011 claimed that he had been enlisted by [REDACTED], contrary to the statement he made before the Chamber.<sup>343</sup>
- In his application, the witness stated that he had fought throughout 2003 and the first three months of 2004, whereas he purportedly left the UPC in March or July 2003.<sup>344</sup>
- In his application, he stated that he had fought in Bunia and Lipri.<sup>345</sup> This information contradicts his testimony that he fought only in Lipri and Barrière.<sup>346</sup>

183. Moreover, this information was eliminated from the reparations form submitted by the witness as Victim a/0052/06, after he had given testimony before the Chamber.<sup>347</sup>

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<sup>339</sup> EVD-D01-00744, p. 0031, lines 584-586.

<sup>340</sup> During the additional interview, he first of all stated that before the war, he had never been to [REDACTED]: EVD-D01-00744, p. 0042, line 959. He then claimed to have lived there with his father, and to have attended school there: EVD-D01-00744, p. 0043, lines 986-1012. However, he stated before the Chamber that he was living in [REDACTED] with [REDACTED], his mother's sister: T-139-CONF-FRA-CT, p. 72, lines 2-10.

<sup>341</sup> Quoted from the witness's testimony: T-140-CONF-FRA-CT, p. 18, line 1, to p. 19, line 5.

<sup>342</sup> T-138-CONF-FRA-CT, p. 58, lines 20-22.

<sup>343</sup> Quoted from the witness's testimony: T-140-CONF-FRA-CT, p. 18, lines 9-22, and p. 25, lines 10-22.

<sup>344</sup> Quoted from the witness's testimony: T-140-CONF-FRA-CT, p. 18, lines 9-15, and p. 19, lines 13-24.

<sup>345</sup> Quoted from the witness's testimony: T-140-CONF-FRA-CT, p. 56, line 14, to p. 57, line 21.

<sup>346</sup> T-140-CONF-FRA-CT, p. 56, lines 10-13.

184. Furthermore, his cross-examination by the Defence revealed many inconsistencies which show that the witness had never been a member of the UPC armed forces and that he had not been enlisted in [REDACTED] as he claimed:

- The witness claimed that it was possible to determine the rank held by UPC commanders from distinctive signs such as insignia and stars.<sup>348</sup> However, the evidence admitted into the record of the case demonstrates the contrary.<sup>349</sup>
- He stated that he went from [REDACTED] to [REDACTED] by motorcycle, without passing through Bunia, travelling on a normal road.<sup>350</sup> However, the Prosecutor demonstrated that it is impossible to go from [REDACTED] to [REDACTED] by motorcycle without passing through Bunia.<sup>351</sup>
- The witness was unable to say where he used to go to dig for gold and had forgotten the name of [REDACTED] village which he had mentioned in his interview in 2005.<sup>352</sup>
- In January 2010, the witness stated that he was studying in [REDACTED] when his parents separated. Since this statement was inconsistent with prior statements about his age at the time his parents separated, the witness had no other choice than to state, against all likelihood, that he was aged 5 years when he was in the

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<sup>347</sup> ICC-01/04-01/06-2270-Anx4.

<sup>348</sup> T-140-CONF-FRA-CT, p. 37, line 18, to p. 38, line 18.

<sup>349</sup> Witness W-0002 explained that the individuals in photograph EVD-OTP-00727 were RCD-Goma soldiers because in Ituri at that time, no one had ranks (T-162-CONF-FRA-CT, p. 86, lines 5-16). Witness W-0017: T-158-CONF-FRA-CT, p. 68, line 23, to p. 69, line 8.

<sup>350</sup> T-140-CONF-FRA, p. 2, line 19, to p. 3, line 10.

<sup>351</sup> Witness W-0017: T-160-CONF-FRA-CT, p. 28, line 21, to p. 29, line 9.

<sup>352</sup> T-139-CONF-FRA-CT, p. 84, line 15, to p. 85, line 22.

2<sup>nd</sup> year of primary school.<sup>353</sup> Yet, it was demonstrated that in the DRC the minimum age for starting primary school is 6 years.

185. Lastly, the testimony of D01-0024, [REDACTED],<sup>354</sup> demonstrates that Witness W-0011 gave false testimony to the Chamber about his place of birth,<sup>355</sup> his school attendance,<sup>356</sup> his enlistment into the UPC armed forces,<sup>357</sup> his mother's death<sup>358</sup> and his mother's name.<sup>359</sup>
186. D01-0024 is in a position to give testimony about W-0011 and his family. Indeed, D01-0024 recognised W-0011 from a photograph.<sup>360</sup> Furthermore, the accuracy of the information provided by D01-0024 during her testimony on the family of W-0011 is proof enough that D01-0024 knows W-0011's family well.<sup>361</sup> Besides, she stated that she was living [REDACTED] with [REDACTED]<sup>362</sup> and that later on she maintained regular contact with [REDACTED].<sup>363</sup>

*- Credibility of the witness*

187. It has been established that Witness W-0011 lied before the Chamber about important elements relating to his civil status and that he was never a soldier in the UPC/RP armed forces.

<sup>353</sup> EVD-D01-00744, pp. 0045-0046, lines 1056-1111. Yet, Witness D01-0029 confirmed that a child could not start primary school unless he had reached the age of 6 years (T-293-CONF-FRA-CT, p. 11, lines 4-7).

<sup>354</sup> T-246-CONF-FRA-CT, p. 8, lines 20-24.

<sup>355</sup> T-246-CONF-FRA-CT, p. 11, line 19.

<sup>356</sup> T-246-CONF-FRA-CT, p. 20, lines 18-22: W-0011 attended the 1<sup>st</sup> and 2<sup>nd</sup> years of primary school in [REDACTED], in [REDACTED], then [REDACTED] in the 3<sup>rd</sup> year. D01-0024 obtained this information from [REDACTED] of W-0011: T-246-CONF-FRA-CT, p. 21, line 17.

<sup>357</sup> Witness D01-0024: T-246-CONF-FRA-CT, p. 30, line 23, to p. 31, line 13 and T-248-CONF-FRA-CT, p. 9, lines 8-14.

<sup>358</sup> T-246-CONF-FRA-CT, p. 9, lines 8-16.

<sup>359</sup> T-246-CONF-FRA-CT, p. 9, lines 1-2.

<sup>360</sup> EVD-OTP-00389 and T-246-CONF-FRA-CT, p. 8, lines 4-17.

<sup>361</sup> For example, the details provided by the witness regarding [REDACTED]: T-246-CONF-FRA-CT, p. 8, line 24, to p. 11, line 19.

<sup>362</sup> T-246-CONF-FRA-CT, p. 15, lines 15-24.

<sup>363</sup> T-246-CONF-FRA-CT, p. 16, lines 14-18, and p. 18, lines 10-15, and T-247-CONF-FRA-CT, p. 13, lines 7-15.

188. In addition to these numerous inconsistencies and contradictions, the witness's behaviour during his testimony and when he gave his statement to the Prosecutor confirm the mendaciousness of his statements. It suggests that during his interview of July 2005, the witness regurgitated false accounts which he had been taught:

- Astonishingly, the witness stated on several occasions during his testimony that he no longer remembered what he had told the Office of the Prosecutor when his statement was taken,<sup>364</sup> rather than saying that he no longer remembered the events that took place in 2002 and 2003.
- When he met with the Office of the Prosecutor in July 2005, the witness had previously written on his jeans the names of the main localities mentioned in his statement.<sup>365</sup> When asked about this, the witness was unable to provide a credible explanation.<sup>366</sup>
- During cross-examination, the witness stated that he no longer remembered his father's name, which he had mentioned in court the previous day.<sup>367</sup>
- As the Prosecutor submits, during his testimony, the witness did indeed correct the errors which he had noticed in his previous statements. However, it should be underscored that on an abnormally high number of occasions the witness was compelled to admit that these statements contained errors or that he no longer remembered what he had said. He even stated that what he had said about the starting point of the attack on Lipri "[TRANSLATION] was not true".<sup>368</sup>

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<sup>364</sup> See, in particular, T-139-CONF-FRA-CT, p. 76, lines 6-8, and T-140-CONF-FRA-CT, p. 44, lines 4-6.

<sup>365</sup> EVD-D01-00062.

<sup>366</sup> T-140-CONF-FRA-CT, p. 62, line 19, to p. 63, line 25.

<sup>367</sup> T-139-CONF-FRA-CT, p. 61, line 14, to p. 62, line 13.

<sup>368</sup> T-140-CONF-FRA-CT, p. 50, lines 11-17.

- W-0011 sometimes forgot information which he had himself provided to the Office of the Prosecutor in July 2005.<sup>369</sup>

189. In light of the foregoing, no credibility can be attached to the statements of this witness.
190. As concerns W-0011's participation as a victim before the Court, the Defence would like to underscore that it is surprising that his legal representatives challenge the reliability of, and attribute very little probative value to, this witness's attestation of birth.<sup>370</sup> Yet, this is the only exhibit offered in proof of the identity and age of the witness, appended to the application for participation as a victim and the application for reparations submitted by their client<sup>371</sup> and on the basis of which W-0011 was admitted to participate in these proceedings.<sup>372</sup>
191. Furthermore, his legal representatives rely on the testimony of W-0031 to allege that Witness W-0011 was wounded whilst taking part in hostilities.<sup>373</sup> However, Witness W-0011 never at any point mentioned the wound referred to by W-0031.
192. Lastly, it would appear that his legal representatives are attempting to mislead the Chamber by claiming once more that the Defence wished to tender into evidence the extract from the IEC database pertaining to [REDACTED], born in 1965,<sup>374</sup> whereas the Defence has always made it clear that it had no intention of relying on this document.<sup>375</sup>

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<sup>369</sup> For example: the witness no longer remembered his nickname: T-139-CONF-FRA-CT, p. 53, line 18, to p. 54, line 6. He also no longer remembered the distinctive signs for the various ranks: T-140-CONF-FRA-CT, p. 37, line 22, to p. 38, line 12, or the area he retreated to after the defeat in Lipri, *idem*, p. 52, lines 4-16.

<sup>370</sup> ICC-01/04-01/06-2744-Conf-tENG, para. 33. EVD-D01-00059.

<sup>371</sup> ICC-01/04-01/06-221-Conf-Exp and ICC-01/04-01/06-2270-Conf-Anx4.

<sup>372</sup> ICC-01/04-01/06-1556-Corr.

<sup>373</sup> ICC-01/04-01/06-2744-Conf-tENG, para. 45.

<sup>374</sup> EVD-D01-01030, document related to Witness D01-0033.

<sup>375</sup> ICC-01/04-01/06-2604-Conf-Corr, para. 55, and ICC-01/04-01/06-2684-Conf, para. 31.

**2.4 DRC-OTP-WWWW-0157 ([REDACTED])**

193. The Defence refers to the observations presented in paragraphs 191 to 195 of its "Defence Application Seeking a Permanent Stay of the Proceedings"<sup>376</sup> and paragraph 62 of its Reply to the "Prosecution's Response to the Defence's 'Requête de la Défense aux fins d'arrêt définitif des procédures'".<sup>377</sup>

194. In addition to the above, the Defence wishes to present the following observations:

- *Contact with intermediaries*

195. Witness W-0157 maintained close relations with Intermediaries W-0031 and W-0267.<sup>378</sup> When he was introduced to the Office of the Prosecutor, and during his interviews with the Office of the Prosecutor, the witness came into contact with Intermediaries W-0321<sup>379</sup> and W-0143. The accounting documents, amongst others, which relate to W-0157 show that he was in contact with Intermediary W-0143 between August and October 2006.<sup>380</sup> W-0321 confirmed that he had contact with W-0157 on numerous occasions, especially after W-0157's trip to [REDACTED], and did so on his own initiative.<sup>381</sup>

- *Credibility of the witness*

196. The witness used numerous subterfuges to elude certain questions and, by so doing, conceal the truth:

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<sup>376</sup> ICC-01/04-01/06-2657-Conf-tENG.

<sup>377</sup> ICC-01/04-01/06-2688-Conf.

<sup>378</sup> He is the nephew of [REDACTED] (W-0267), [REDACTED] of the NGO [REDACTED] (*Tableau des contacts* EVD-D01-01039, p. 5869, No. 108). He was introduced to the Office of the Prosecutor by W-0031, [REDACTED] of W-0267 (*idem*, p. 5863, No. 79). W-0157 stated that he had close ties with W-0031: T-188-CONF-FRA-CT, p. 71, lines 4-10.

<sup>379</sup> W-0321: T-308-CONF-FRA-ET, p. 42, lines 10-19. See also EVD-D01-01039, p. 5879, No. 134.

<sup>380</sup> EVD-D01-00832 and EVD-D01-00833.

<sup>381</sup> T-320-CONF-FRA-ET, p. 43, lines 3-11 and p. 50, lines 14-27.

- The witness claimed that he was unable to read,<sup>382</sup> thus compelling the Defence to review its methods of examination.<sup>383</sup> Yet, there is no doubt that W-0157 can read and write Lingala and French,<sup>384</sup> as he himself also admitted.<sup>385</sup>
- W-0157 refused to testify about his presence in the FNI armed group.<sup>386</sup>
- In a bid to arouse sympathy, the witness stated that he was afraid to appear before so many people.<sup>387</sup> However, it is worth noting that the witness himself has already [REDACTED] for 2 weeks<sup>388</sup> and his words belie his alleged vulnerability.<sup>389</sup>
- In a bid to conceal certain chronological inconsistencies, the witness refused to answer many Defence questions about the time and duration of certain events.<sup>390</sup> However, he stated that he could not recall certain dates because [REDACTED].<sup>391</sup>

197. Moreover, contrary to what the Prosecutor claims in paragraph 201, the Defence submits that W-0157 refused to answer several questions which seemed to disconcert him and stated that these were events which he did not personally witness. Questioned about an alleged visit of Mr Thomas Lubanga

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<sup>382</sup> See e-mail from the legal adviser to the Trial Division entitled "VWU recommendations for Witness 157", dated 28 May 2009, stating: "The witness is not asked to read any text in Lingala, Swahili or French during his testimony. Reading assistance is provided". See also: T-187-CONF-FRA-CT, p. 23, line 2.

<sup>383</sup> T-186-CONF-FRA-CT, p. 2, line 3, to p. 3, line 2, and T-187-CONF-FRA-CT, p. 22, line 25, to p. 23, line 14.

<sup>384</sup> T-187-CONF-FRA-CT, p. 20, lines 19-21, and p. 21, lines 5-6. [REDACTED]: T-187-CONF-FRA-CT, p. 21, lines 12-18.

<sup>385</sup> T-187-CONF-FRA-CT, p. 25, line 22, to p. 26, line 1. See also EVD-D01-00087, hand-written document from the witness.

<sup>386</sup> For example, T-187-CONF-FRA-CT, p. 13, line 20, to p. 14, line 5. T-188-CONF-FRA-CT, p. 20, lines 3-16; p. 20, line 22, to p. 22, line 22; p. 41, lines 5-7; p. 42, lines 7-13.

<sup>387</sup> T-185-CONF-FRA-CT, p. 61, lines 9-11.

<sup>388</sup> T-187-CONF-FRA-CT, p. 21, lines 15-18.

<sup>389</sup> T-188-CONF-FRA-CT, p. 21, line 22, to p. 22, line 22, and p. 35, line 21, to p. 36, line 11.

<sup>390</sup> See, for example, T-188-CONF-FRA-CT, p. 19, lines 2-3; p. 29, line 10; p. 30, line 25; p. 31, line 25, to p. 32, line 1; and p. 35, lines 15-17.

<sup>391</sup> T-187-CONF-FRA-CT, p. 22, lines 15-18.

to the Mandro training camp which the witness claimed to have witnessed, he responded: “[TRANSLATION] As I have told you, there are events I cannot recount because it hurts me. There are other events that I did not witness and therefore, in these circumstances, it is really difficult for me to answer some of your questions” [emphasis added].<sup>392</sup>

*- The witness's statements*

198. The testimonial and documentary evidence demonstrates that not only was W-0157 above the age of 15 years as of 1 September 2002, but also that he has never been a soldier within the ranks of the UPC/RP armed forces.
199. The behaviour of W-0157 during his testimony and the major inconsistencies and contradictions that taint his statements reveal the mendaciousness of his testimony.

The witness's age

200. W-0157 claimed to have been born on [REDACTED] 1991 in [REDACTED].<sup>393</sup>
201. However, the documentary evidence consistently shows that the witness was born on [REDACTED] 1986 and that he was therefore more than 15 years old in 2002 and 2003:
- EVD-D01-01031: extract from the IEC database showing that [REDACTED] is the bearer of a voting card. The said card bears his photograph.<sup>394</sup> It is stated that the bearer of the card was born on [REDACTED]/1986, in [REDACTED], to [REDACTED] (mother) and [REDACTED] (father).<sup>395</sup>

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<sup>392</sup> T-186-CONF-FRA-CT, p. 34, lines 7-10 [emphasis added].

<sup>393</sup> T-185-CONF-FRA-CT, p. 64, line 8.

<sup>394</sup> EVD-D01-00121.

<sup>395</sup> With the exception of the birth year, the information contained in the voting card is consistent with the information provided by W-0157 during his testimony: T-185-CONF-FRA-CT, p. 62, line 17, and p. 63, lines 10-14. This document was obtained by the Registry of the Court at the request of the Defence: EVD-D01-01025 and EVD-D01-01026.

- EVD-D01-00258, #[REDACTED]: it is stated that a pupil by the name of [REDACTED], born in [REDACTED] on [REDACTED]/1986, completed [REDACTED] in 1998.<sup>396</sup>
- EVD-D01-00257 and EVD-D01-00170, p. [REDACTED], #[REDACTED]:<sup>397</sup> the enrolment register of [REDACTED] for 1996-1997 shows that pupil [REDACTED], born on [REDACTED]/1986 in [REDACTED], to [REDACTED] (father) and [REDACTED] (mother), was enrolled in the 5<sup>th</sup> year.
- EVD-D01-00169, p. [REDACTED], #[REDACTED]: 1991-2001 certificate award register for [REDACTED]: it is stated that W-0157, born on [REDACTED]/1986, obtained certificate no. [REDACTED]. The experts did not observe any replacement, erasure or modification on the line bearing the name [REDACTED].<sup>398</sup>

202. When confronted with certain documents relating to his school attendance and bearing the date [REDACTED]/1986, the witness stated: “[TRANSLATION] it is as I told you; I do not know the date of birth, my parents are the ones who know it.”<sup>399</sup> This assertion is all the more surprising because a few days earlier, the witness had stated that he was born on [REDACTED] 1991.<sup>400</sup>
203. No document admitted into the record of the case corroborates W-0157’s statements on his age.
204. Besides, D01-0025, [REDACTED] of W-0157, was born on [REDACTED] 1989. He stated that W-0157 is older than he. This statement contradicts Witness W-

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<sup>396</sup> Corroborated by EVD-D01-00259, No. [REDACTED] (results of the national primary school leaving examination for the [REDACTED] school, 1998).

<sup>397</sup> As concerns the probative value of this document, the Defence refers to ICC-01/04-01/06-2479-Conf, paras. 7-9.

<sup>398</sup> EVD-OTP-00639, pp. 0206-0207 and 0322. As concerns the probative value of this document, the Defence refers to ICC-01/04-01/06-2479-Conf, paras. 7-9.

<sup>399</sup> T-188-CONF-FRA-CT, p. 64, lines 4-5.

<sup>400</sup> T-185-CONF-FRA-CT, p. 64, lines 6-8.

0157, and tends to corroborate the information found in the abovementioned documents.<sup>401</sup>

205. Moreover, the Prosecutor seems to concede in paragraph 515 of his observations that W-0157 was possibly aged 15 years or more in September 2002.

The witness's school attendance

206. The witness claimed that he attended [REDACTED] up to the 4<sup>th</sup> year, and then did his 5<sup>th</sup> and 6<sup>th</sup> years of primary school at [REDACTED].<sup>402</sup> He stated that he continued his studies at [REDACTED] in [REDACTED].<sup>403</sup> He stated that he was enlisted into the UPC armed forces at the start of his [REDACTED] year of secondary school,<sup>404</sup> during the 2002-2003 academic year.<sup>405</sup>
207. Not only are the witness's statements contradictory on this point, but the evidence admitted into the record of the case shows that his statements are manifestly mendacious.
208. The evidence admitted into the record of the case shows that W-0157 indeed completed his primary education at [REDACTED], not in 2002 as he claimed, but in 1998.
209. In this regard, the Defence refers to the following documents:
- **1996-1997:** The enrolment register of [REDACTED] for 1996-1997, which includes the pupil [REDACTED], born on [REDACTED]/1986 in [REDACTED],

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<sup>401</sup> T-259-CONF-FRA-ET, p. 9, line 4, and p. 12, line 23, to p. 13, line 2.

<sup>402</sup> T-185-CONF-FRA-CT, p. 64, line 25, to p. 65, line 15.

<sup>403</sup> T-185-CONF-FRA-CT, p. 65, line 21, to p. 66, line 1.

<sup>404</sup> T-185-CONF-FRA-CT, p. 69, lines 10-13.

<sup>405</sup> He claims to have been enlisted at the time when the UPC was in control of Bunia, that is, after September 2002: T-185-CONF-FRA-CT, p. 71, lines 8-10.

to [REDACTED] (father) and [REDACTED] (mother). It is stated that he was admitted into the 5<sup>th</sup> year of [REDACTED] on [REDACTED].<sup>406</sup>

- **1997-1998:** It is stated that a pupil by the name of [REDACTED], born in [REDACTED] on [REDACTED]/1986, completed the school, [REDACTED], in the 1997-1998 academic year.<sup>407</sup>

210. In response to the Defence suggestion that he completed his primary education in 1998, the witness stated: “[TRANSLATION] I do not know. It could be true; it is certified by a document. It could be true.”<sup>408</sup> The witness did not, at any point, challenge the reliability of the abovementioned documents.

211. Moreover, the documents tendered into evidence by the Defence are corroborated by document EVD-D01-00169,<sup>409</sup> which the Prosecutor obtained through his investigations. The experts commissioned by the Office of the Prosecutor did not observe any replacement, erasure or modification on the line bearing the name [REDACTED].<sup>410</sup>

212. In addition, the witness’s statements about his school attendance are not corroborated by any document. On the contrary, EVD-D01-00168 and EVD-D01-00180 demonstrate that the witness was not registered in [REDACTED] on the specified dates.

213. Lastly, at the end of the Defence cross-examination on this point, the witness stated that he did not study from 2000-2005.<sup>411</sup> This statement contradicts the

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<sup>406</sup> EVD-D01-00257, #2579.

<sup>407</sup> EVD-D01-00258, #[REDACTED]; EVD-D01-00259, #42; EVD-D01-00169, p. [REDACTED].

<sup>408</sup> T-188-CONF-FRA-CT, p. 65, lines 7-11.

<sup>409</sup> EVD-D01-00169, p. [REDACTED]; certificate award register for 1991-2001, [REDACTED]: it is stated that W-0157 was born on [REDACTED]/1986 and obtained certificate no. [REDACTED].

<sup>410</sup> EVD-OTP-00639, pp. 0206, 0207 and 0322. The Defence refers to ICC-01/04-01/06-2479-Conf, paras. 7-9.

<sup>411</sup> T-188-CONF-FRA-CT, p. 68, lines 4-9.

witness's allegation that he was enlisted into the UPC army in 2002<sup>412</sup> as he was returning from school.<sup>413</sup>

The witness's military activities

214. The testimonial and documentary evidence shows that W-0157 has never been a soldier in the UPC/RP armed forces, but that he was a soldier in the FNI.
215. Witness W-0031, whom W-0157 considers as [REDACTED], [REDACTED], stated that the witness had been a member of the FNI armed group alone.<sup>414</sup>
216. D01-0025, [REDACTED] of W-0157, confirmed that W-0157 fled [REDACTED] in May 2003 to join the FRPI in [REDACTED].<sup>415</sup>
217. Contrary to the Office of the Prosecutor's claims, no credence can be lent to the statements of Intermediary W-0321 regarding the enlistment of W-0157 into the UPC armed forces.<sup>416</sup> Indeed, W-0321 erroneously stated that Witness W-0157 joined Kahwa's military forces for a while and that he had never been a member of the FNI.<sup>417</sup> These statements contradict those of W-0157.<sup>418</sup>
218. Moreover, it is worth noting that during his first two meetings with the Office of the Prosecutor in 2005 and 2006, W-0157 only talked about his presence within the FNI, without mentioning that he had been enlisted into the armed wing of the UPC.<sup>419</sup>

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<sup>412</sup> T-185-CONF-FRA-CT, p. 71, lines 8-10.

<sup>413</sup> T-185-CONF-FRA-CT, p. 67, lines 21-22.

<sup>414</sup> T-202-CONF-FRA-ET, p. 77, lines 13-18, and T-188-CONF-FRA-CT, p. 71, lines 4-7, "[TRANSLATION] [REDACTED], he's like [REDACTED]; he knows me very well. [...] When you take him as being [REDACTED], he is supposed to know all...all, all your life. So there are times when you will have a chat and you will tell him all that."

<sup>415</sup> T-259-CONF-FRA-ET, p. 17, line 23, to p. 18, line 25.

<sup>416</sup> ICC-01/04-01/06-2758-Conf, para. 518.

<sup>417</sup> T-320-CONF-FRA-ET, p. 42, lines 16-23.

<sup>418</sup> The witness never mentioned that he had been enlisted into PUSIC. He did confirm, however, that he was a member of the FNI: T-188-CONF-FRA-CT, p. 42, lines 14-15.

<sup>419</sup> T-188-CONF-FRA-CT, p. 46, line 16, to p. 47, line 1.

219. Lastly, many aspects of W-0157's testimony confirm the assertion that the witness had been a soldier of the FNI and not the FPLC: (1) the witness's statements about his schooling are manifestly mendacious; (2) the witness's statements about the periods and duration of his service are inconsistent; and (3) the witness's statements on certain aspects of his testimony are contradictory.

*- The witness's statements regarding his schooling*

220. As explained in detail above, the witness's statements regarding his schooling are inconsistent with his testimony about the circumstances of his enlistment. The witness claimed that he was enlisted shortly after completing his 6<sup>th</sup> year of primary school,<sup>420</sup> at the beginning of the 2002-2003 academic year. This statement is inconsistent with:

- his statements that he did not study from 2000 to 2005;<sup>421</sup>
- documents EVD-D01-00258, #[REDACTED] and EVD-D01-00259, #[REDACTED], which were not challenged by the witness and which demonstrate that he completed his 6<sup>th</sup> year of primary school in 1998 and not in 2002.

*- The witness's statements regarding time periods and duration*

221. During his examination by the Office of the Prosecutor, the witness stated that he was enlisted into the UPC armed forces at the time the UPC was occupying Bunia;<sup>422</sup> that he was then taken to the Mandro training centre<sup>423</sup> where he allegedly spent **4 to 5 months**;<sup>424</sup> that he was sent to [REDACTED] for a very

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<sup>420</sup> T-185-CONF-FRA-CT, p. 69, lines 11-13.

<sup>421</sup> T-188-CONF-FRA-CT, p. 68, lines 4-9.

<sup>422</sup> T-185-CONF-FRA-CT, p. 71, lines 8-10.

<sup>423</sup> T-185-CONF-FRA-CT, p. 81, lines 12-13.

<sup>424</sup> T-186-CONF-FRA-CT, p. 36, lines 14-21.

**short time;**<sup>425</sup> that he was deployed to [REDACTED] for a period of **4 months;**<sup>426</sup> that he was in [REDACTED] for a little while;<sup>427</sup> and that he was then deployed to Rwampara.<sup>428</sup>

222. However, the witness also stated that he left the UPC **3 or 4 months before 6 March 2003.**<sup>429</sup> This statement is inconsistent with the above chronology.

*- Contradictory statements by the witness*

223. The Defence cross-examination revealed many contradictions between the witness's various statements and major inconsistencies, especially about the circumstances of his alleged enlistment by UPC soldiers and his alleged military activities in the armed wing of the UPC. For example:

- During his testimony, the witness claimed that he was enlisted [REDACTED] located in [REDACTED].<sup>430</sup> However, in his interview with Office of the Prosecutor investigators, he had claimed that he was enlisted at [REDACTED].<sup>431</sup>
- During his testimony, W-0157 stated that he was enlisted after Bunia had been captured by the UPC.<sup>432</sup> However, during a meeting with the Prosecutor in 2005, the witness had stated that he was enlisted between late 2000 and early 2001.<sup>433</sup>

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<sup>425</sup> T-187-CONF-FRA-CT, p. 3, lines 3-6.

<sup>426</sup> T-186-CONF-FRA-CT, p. 38, lines 21-22, and p. 39, lines 9-10.

<sup>427</sup> T-187-CONF-FRA-CT, p. 6, lines 4-7.

<sup>428</sup> T-187-CONF-FRA-CT, p. 6, lines 14-16 and 23.

<sup>429</sup> T-188-CONF-FRA-CT, p. 45, line 19, to p. 46, line 4.

<sup>430</sup> T-185-CONF-FRA-CT, p. 68, lines 4-6 and 16.

<sup>431</sup> T-187-CONF-FRA-CT, p. 29, line 10, to p. 30, line 22.

<sup>432</sup> T-185-CONF-FRA-CT, p. 71, lines 8-10.

<sup>433</sup> T-187-CONF-FRA-CT, p. 33, lines 17-20.

- The witness stated that he was taken to Bunia stadium in a Toyota Hilux,<sup>434</sup> whereas he had stated in October 2006 that he had walked to Bunia stadium when he was enlisted.<sup>435</sup>
- The witness claimed that he went to Mandro camp in a lorry,<sup>436</sup> whereas it has been demonstrated that the camp was not accessible by vehicle.<sup>437</sup>
- The witness stated that commander Pepe was the highest-ranking officer in Mandro camp,<sup>438</sup> whereas commander Pepe died in Beni in 2001 whilst serving in the APC.<sup>439</sup>
- Contrary to what he said during his testimony,<sup>440</sup> W-0157 had told Office of the Prosecutor investigators in 2007 that when Thomas Lubanga used to come to Mandro camp, he could not see him.<sup>441</sup>
- He claimed to have fought as a UPC soldier<sup>442</sup> in Nyankunde on only one occasion, and then to have fought in Djugu.<sup>443</sup> However, this assertion is a complete contradiction of the statement he made in 2006, when he said that he had fought in Nyankunde under commander [REDACTED] of the FNI, and did so in all subsequent battles.<sup>444</sup>

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<sup>434</sup> T-185-CONF-FRA-CT, p. 75, lines 22-25.

<sup>435</sup> T-187-CONF-FRA-CT, p. 37, line 16, to p. 39, line 1.

<sup>436</sup> T-185-CONF-FRA-CT, p. 81, lines 6-13, and p. 82, lines 18-19.

<sup>437</sup> W-0016: T-191-CONF-FRA-CT, p. 35, lines 10-25; W-0299: T-119-CONF-FRA-CT, p. 64, lines 16-21.

<sup>438</sup> T-186-CONF-FRA-CT, p. 14, lines 16-19, and T-188-CONF-FRA-CT, p. 7, lines 4-11, and p. 8, lines 10-18.

<sup>439</sup> D01-0026: T-254-CONF-FRA-CT, p. 63, lines 13-18; D01-0037: T-349-FRA-ET, p. 17, lines 1-4; D01-0007: T-348-FRA-ET, p. 22, line 27, to p. 23, line 15.

<sup>440</sup> T-186-CONF-FRA-CT, p. 27, line 16, to p. 28, line 3.

<sup>441</sup> EVD-OTP-00682, para. 160; T-188-CONF-FRA-CT, p. 9, lines 13-20.

<sup>442</sup> T-188-CONF-FRA-CT, p. 18, lines 8-11.

<sup>443</sup> T-188-CONF-FRA-CT, p. 19, lines 10-14.

<sup>444</sup> T-188-CONF-FRA-CT, p. 19, line 16, to p. 21, line 1.

- In October 2006, the witness had stated to Office of the Prosecutor investigators that he participated in the battle of Bunia as a UPC soldier, contrary to the claims he made before the Court during his testimony.<sup>445</sup>
- In his first interviews with the Office of the Prosecutor, the witness made no reference to commander [REDACTED].<sup>446</sup> Yet, before the Chamber, he presented him as his instructor who was permanently present in [REDACTED] camp and his commander when he was deployed to [REDACTED].<sup>447</sup>
- The witness denied having told the Prosecutor that he was abducted by the FNI to undergo military training,<sup>448</sup> whereas he had made such a statement to the Office of the Prosecutor in 2006.
- The witness also stated that it was impossible for a person to join the FNI if he was known to have worked with the UPC.<sup>449</sup> This assertion suggests that the witness had not been a UPC/RP soldier prior to joining the FNI.

224. The witness was unable to specify the duration of events or the time when they occurred, whereas he had been able to do so during his interview with the Office of the Prosecutor. For example, the witness was unable to specify the time and duration of his stay in Rwampara, contrary to what he had done in February 2007.<sup>450</sup>

225. In light of the foregoing, the Defence considers that it has been demonstrated that Witness W-0157 falsely claimed to have been forcibly enlisted into the FPLC, whereas he had instead been serving as a soldier within the FNI group during that period.

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<sup>445</sup> T-188-CONF-FRA-CT, p. 42, line 24, to p. 44, line 1.

<sup>446</sup> T-188-CONF-FRA-CT, p. 4, line 1, to p. 5, line 15.

<sup>447</sup> T-186-CONF-FRA-CT, p. 14, lines 16-19, and T-187-CONF-FRA-CT, p. 2, lines 16-21.

<sup>448</sup> T-188-CONF-FRA-CT, p. 47, lines 15-23.

<sup>449</sup> T-188-CONF-FRA-CT, p. 44, lines 4-7 and 14-16.

<sup>450</sup> EVD-OTP-00682, para. 13. T-188-CONF-FRA-CT, p. 29, lines 6-23.

## 2.5 DRC-OTP-WWWW-0213 ([REDACTED])

### 2.5.1 Credibility of the witness

226. The witness was introduced to the Office of the Prosecutor by Intermediary W-0321,<sup>451</sup> who encouraged him to state mendaciously that he had been enlisted into the UPC armed forces whilst he was under the age of 15 years. On this subject, the Defence refers to the observations set out in its "Defence Application Seeking a Permanent Stay of the Proceedings"<sup>452</sup> and the relevant paragraphs of its Reply to the "Prosecution's Response to the Defence's *'Requête de la Défense aux fins d'arrêt définitif des procédures'*".<sup>453</sup>
227. During his testimony, when his account was clearly deviating from the narrative he had provided to the Office of the Prosecutor during his interview of November 2007, the witness sought leave to re-read his written statement.<sup>454</sup> Re-reading the document enabled the witness, when he returned to the courtroom, to retract the statements he had just made about his alleged second abduction, and to recite a completely different account to the Chamber.<sup>455</sup>
228. Yet, the witness confirmed that he had had the opportunity to read his written statement when he arrived in The Hague "[TRANSLATION] when he had a little time" or when he felt like it.<sup>456</sup>
229. The witness was evasive on certain points which he had nonetheless discussed in detail with the Office of the Prosecutor when his written statement was taken in November and December 2007.<sup>457</sup> The witness refused to provide

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<sup>451</sup> Table of contacts and connections, EVD-D01-01039, #96, p. 5867.

<sup>452</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 127-130.

<sup>453</sup> ICC-01/04-01/06-2688-Conf, paras. 42 and 43.

<sup>454</sup> T-132-CONF-FRA-CT, p. 17, line 18, to p. 18, line 8.

<sup>455</sup> For example, the place of second enlistment: whilst returning from school: T-132-CONF-FRA-CT, p. 16, line 15, to p. 17, line 2; whilst he was playing football, T-132-CONF-FRA-CT, p. 22, line 4.

<sup>456</sup> T-133-CONF-FRA-CT, p. 15, lines 11-20.

<sup>457</sup> For example, the witness gave no indication of time and duration. For example: T-133-CONF-FRA-CT, p. 67, lines 13-14; p. 74, lines 2-12; p. 78, lines 10-16; and p. 79, lines 3-9.

certain information, such as the name of the person who received him at [REDACTED].<sup>458</sup>

230. At the end of his testimony, W-0213 confusedly explained that he had lied about his identity, his date of birth, the names of his parents and the place where he had studied. Furthermore, he explained that together with his mother, he had planned to lie about his own identity if ever the question were put to him.<sup>459</sup> Although he subsequently confirmed that he had spoken the truth during his testimony,<sup>460</sup> the Defence considers that this confession raises serious doubts about the integrity of this witness's statements.

### 2.5.2 The content of his testimony

231. The statements of Witness W-0213 are manifestly mendacious. They are replete with numerous implausibilities, contradictions and inconsistencies on material aspects of his testimony, such as his age, school attendance, enlistment and activities within an armed group.

#### *- His identity*

232. W-0213 provided several items of inaccurate information on his identity or that of his family members:

- Witness W-0213 stated that his name is [REDACTED].<sup>461</sup> Prior to a question being put to him in that regard during the Defence cross-examination, he had never stated that he bore the name [REDACTED].<sup>462</sup>

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<sup>458</sup> For example, the witness refused to name the people with whom he went to the demobilization centre: T-133-CONF-FRA-CT, p. 33, lines 20-22, or the person who received him at [REDACTED], or [REDACTED]: T-133-CONF-FRA-CT, p. 37, lines 5-10.

<sup>459</sup> T-134-CONF-FRA-CT, p. 74, line 2, to p. 75, line 12 and line 25, to p. 76, line 5.

<sup>460</sup> T-134-CONF-FRA-CT, p. 83, line 23, to p. 84, line 7.

<sup>461</sup> T-132-CONF-FRA-CT, p. 5, line 18.

<sup>462</sup> T-133-CONF-FRA-CT, p. 17, lines 7-19.

- D01-0002 confirmed that W-0213 is called [REDACTED] and that he was enrolled in school under that name.<sup>463</sup>
- According to the screening note of the meeting held in November 2007 with Office of the Prosecutor investigator W-0581, W-0213 stated on that occasion that he had a brother and a sister,<sup>464</sup> contrary to what he said during his testimony.<sup>465</sup>

*- His age at the time of his enlistment into the UPC*

233. Witness W-0213 stated that he was born on [REDACTED] 1991 in [REDACTED]. He claimed to have received this information from his parents.<sup>466</sup> This statement is contradicted by the register of [REDACTED] school [REDACTED], which indicates that W-0213 was born in [REDACTED] in 1989.<sup>467</sup>

*- His school attendance*

234. The witness stated that he studied in [REDACTED] right up to the 6<sup>th</sup> year of primary school.<sup>468</sup> He stated that he dropped out in the 3<sup>rd</sup> year because he was enlisted into the UPC army.<sup>469</sup>

235. This statement is contradicted by the following information:

- [REDACTED] provided precise details on the witness's true school attendance;<sup>470</sup>

<sup>463</sup> T-236-CONF-FRA-ET, p. 31, line 8, and p. 37, lines 3-4.

<sup>464</sup> EVD-D01-00318.

<sup>465</sup> T-133-CONF-FRA-CT, p. 23, lines 17-20.

<sup>466</sup> T-132-CONF-FRA-CT, p. 6, lines 8-9, 21-24.

<sup>467</sup> EVD-D01-00054, p. [REDACTED], for the 2002-2003 academic year. The witness recognized the entries "[REDACTED]", "[REDACTED]", "[REDACTED]", and "[REDACTED]". W-0213 also recognized the use of the name "[REDACTED]". "2002-2003" appears at p. 0131: T-133-CONF-FRA-CT, p. 17, lines 7-19.

<sup>468</sup> T-132-CONF-FRA-CT, p. 7, lines 2-7.

<sup>469</sup> T-132-CONF-FRA-CT, p. 7, lines 8-17.

<sup>470</sup> D01-0002 stated that W-0213 started primary school in [REDACTED]. Later, this school was transferred to [REDACTED]. They then went to [REDACTED], and after some time, enrolled him in the [REDACTED] primary school until 6 March 2003. In September 2005, he attended the 6<sup>th</sup> year of primary in [REDACTED] school for a month and a half. T-236-CONF-FRA-ET, p. 34, lines 12-23.

- D01-0029 stated that there is no [REDACTED] school in [REDACTED];<sup>471</sup>
- The register of [REDACTED] school in [REDACTED] shows that W-0213 was enrolled not in the [REDACTED] school in [REDACTED] in 2002-2003, as he claimed, but in the 4<sup>th</sup> year of primary school in the [REDACTED] school of [REDACTED].<sup>472</sup>

*- His presence within the UPC forces and the circumstances of his enlistment*

236. The testimony of W-0213 is tainted by major contradictions and implausibilities revealed by the Defence cross-examination, both with respect to the circumstances of his enlistment<sup>473</sup> and his alleged activities within the armed wing of the UPC,<sup>474</sup> especially the following.

#### First enlistment

237. The witness contradicted himself significantly regarding the circumstances of his first enlistment, providing various versions of this event.
238. The witness provided three different versions of his alleged first abduction: he first told investigators in November 2007 that he had been enlisted whilst he

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<sup>471</sup> D01-0029 has held various posts in the education sector, including coordinator of schools for 13 years. T-293-CONF-FRA-CT, p. 21, lines 11-20.

<sup>472</sup> EVD-D01-00054, p. 0140, No. 2297: The register shows that W-0213, born in [REDACTED] in 1989, was enrolled in the 4<sup>th</sup> year of primary of that school in 2002-2003. See p. 0132 for a reference to the 2002-2003 academic year.

<sup>473</sup> The witness contradicted himself about when he was enlisted for the first time, on his way to school, T-132-CONF-FRA-CT, p. 10, lines 10-17, or on his return, T-133-CONF-FRA-CT, p. 65, lines 17-19. On the duration of the first period W-0213 spent in the UPC army: T-133-CONF-FRA-CT, p. 70, lines 4-11, and p. 71, line 20, to p. 72, line 10. It should be noted that at one point, the witness stated that he was "[TRANSLATION] in the process of forgetting", and asked to re-read his written statement during the adjournment: T-132-CONF-FRA-CT, p. 17, line 2 and line 22 to p. 18, line 8; W-0213 contradicted himself on the time spent at Lopa camp before his [REDACTED]: T-134-CONF-FRA-CT, p. 43, line 7, to p. 44, line 14.

<sup>474</sup> W-0213 provided contradictory information about the amount of time he spent at Bule camp. First, he stated that he spent three months there, T-132-CONF-FRA-CT, p. 9, lines 12-13, and then six months, T-134-CONF-FRA, p. 26, lines 8-11, and p. 42, lines 2-3. He finally stated that he could not recall how long he had spent in Bule, T-134-CONF-FRA, p. 25, lines 7-9; he contradicted himself regarding his being acquainted with Mr Rafiki and Chief Kahwa: T-134-CONF-FRA-CT, p. 48, lines 4-24; Contradiction regarding his return to [REDACTED] before fighting the Ugandans: T-134-CONF-FRA-CT, p. 52, line 12, to p. 53, line 8.

was at home;<sup>475</sup> he subsequently stated during his testimony that he was enlisted for the first time into the UPC when he was returning from school;<sup>476</sup> finally, during the same testimony, he stated that he had been enlisted when he was leaving home to go to school.<sup>477</sup>

239. The witness provided two versions of his account of his presence at the Lopa training camp during his first abduction: he first stated that he was taken to the Lopa camp, where he immediately started his military training, and escaped after spending 3 or 4 weeks in this camp.<sup>478</sup> During his cross-examination, he instead claimed that he immediately took weapons to a camp situated close to Rwampara, where he stayed for a time.<sup>479</sup>
240. W-0213 stated that he spent 3 or 4 weeks in Lopa camp. However, in November 2007, he had told the Office of the Prosecutor investigators that he spent a week there.<sup>480</sup>
241. The witness contradicted himself when he stated that after his first enlistment he fled from two different camps; either Lopa<sup>481</sup> or the camp situated near Rwampara.<sup>482</sup>
242. The witness claimed that the soldiers travelled on foot to the [REDACTED] to recruit them, whereas in 2007 he had told Office of the Prosecutor investigators that they travelled in a lorry.<sup>483</sup>

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<sup>475</sup> T-134-CONF-FRA-CT, p. 3, line 13, to p. 4, line 9 (quoted from paras. 22-24 of the 2005 statement).

<sup>476</sup> T-132-CONF-FRA-CT, p. 9, lines 5-6, and p. 10, lines 10-14.

<sup>477</sup> T-133-CONF-FRA-CT, p. 65, lines 14-19.

<sup>478</sup> T-132-CONF-FRA-CT, p. 12, lines 7-23, to p. 13, line 15, to p. 14, line 2.

<sup>479</sup> T-134-CONF-FRA-CT, p. 10, lines 8-12, p. 12, line 14, to p. 14, line 6 (quoted from para. 25 of the statement).

<sup>480</sup> T-133-CONF-FRA-CT, p. 70, lines 8-11, and p. 71, line 20, to p. 72, line 10 (quoted from para. 29 of the statement).

<sup>481</sup> T-133-CONF-FRA-CT, p. 67, lines 8-17.

<sup>482</sup> T-134-CONF-FRA-CT, p. 17, lines 20-24.

<sup>483</sup> T-133-CONF-FRA-CT, p. 76, line 17, to p. 77, line 14 (quoted from paras. 34-37 of the statement).

Second enlistment

243. The witness gave two different versions of the circumstances of his second abduction: he first of all stated that he had been enlisted for the second time whilst he was returning from school; that he started off from [REDACTED] on a long journey to go and carry weapons and ammunition; that he underwent training at that location and escaped when he went to fetch water.<sup>484</sup> After re-reading his statement, he stated that he was enlisted the second time whilst he was playing with 21 other children [REDACTED]; that he was taken directly to Bule camp; and that he escaped by pretending to go to the toilet.<sup>485</sup>
244. With regard to his alleged second enlistment, the witness stated that he was taken to two different camps: he first claimed to have been taken immediately to Bule camp, and then during cross-examination, he stated that he was first taken to Lopa camp.<sup>486</sup>
245. There is a contradiction as regards the witness's enlistment date: he stated that he was enlisted whilst he was in the 4<sup>th</sup> year of primary school, in May during the revision period, and that he stayed in Bule camp for 6 months.<sup>487</sup> This statement is inconsistent<sup>488</sup> with his claim that he completed the 4<sup>th</sup> year of primary school,<sup>489</sup> which ends on 2 July.<sup>490</sup>
246. The witness stated that he received an SMG and a magazine of 32 bullets after his training in Bule.<sup>491</sup> This assertion contradicts his statements provided to the Office of the Prosecutor in November 2007.<sup>492</sup>

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<sup>484</sup> T-132-CONF-FRA-CT, p. 16, lines 15-24.

<sup>485</sup> T-132-CONF-FRA-CT, p. 21, lines 17-23; p. 22, lines 2-4; p. 24, lines 20-23; p. 25, lines 24-25; and p. 39, line 23, to p. 40, line 2.

<sup>486</sup> T-132-CONF-FRA-CT, p. 24, lines 22-23, and T-134-CONF-FRA-CT, p. 22, lines 10-25.

<sup>487</sup> The witness agreed with the assertions put to him on the basis of his statements of November 2007: T-134-CONF-FRA-CT, p. 26, lines 8-11; p. 26, line 23, to p. 27, line 2; and p. 42, lines 2-3.

<sup>488</sup> The witness was unable to provide a plausible explanation: T-134-CONF-FRA, p. 29, lines 3-4.

<sup>489</sup> T-134-CONF-FRA-CT, p. 27, line 11.

<sup>490</sup> T-134-CONF-FRA-CT, p. 27, lines 8-9.

<sup>491</sup> T-134-CONF-FRA-CT, p. 29, lines 5-17.

247. The testimony of W-0213 contains many implausibilities:

- The witness claimed that when he was abducted from the [REDACTED], he went to the training camp on foot.<sup>493</sup> However, if the witness had indeed been taken to Bule, it is implausible that the road between [REDACTED] and Bule would have been covered on foot.<sup>494</sup>
- The witness claimed that commander Bosco was living in Katoto.<sup>495</sup>
- The witness claimed that he escaped to Fataki whilst he was on the road linking Bule to Zumbe.<sup>496</sup> However, Fataki is located in the opposite direction. From Fataki, he claimed to have returned to [REDACTED] on foot, in one day.<sup>497</sup>

### Third enlistment

248. W-0213 stated that he was enlisted for a third time. He alleges to have then been taken to Lopa camp, where he was immediately detained in a trench, for several weeks, with 5 other persons.<sup>498</sup> This version is inconsistent with the one he provided to the Office of the Prosecutor in November 2007,<sup>499</sup> in which he stated that he had been taken to Lopa camp and that when he tried to escape, he was captured and detained alone in an underground dungeon.

249. It is implausible that after being detained for several weeks because he had “[TRANSLATION] betrayed the nation” or “[TRANSLATION] fled the army”,<sup>500</sup> he

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<sup>492</sup> T-134-CONF-FRA-CT, p. 29, line 23, to p. 30, line 6 (quoted from para. 48 of the statement).

<sup>493</sup> T-133-CONF-FRA-CT, p. 76, lines 17-23.

<sup>494</sup> For example: EVD-OTP-00399.

<sup>495</sup> T-134-CONF-FRA-CT, p. 33, lines 22-25.

<sup>496</sup> T-134-CONF-FRA-CT, p. 37, lines 6-9.

<sup>497</sup> T-134-CONF-FRA-CT, p. 37, lines 19-21, and p. 38, lines 6-11. See also EVD-OTP-00399.

<sup>498</sup> T-132-CONF-FRA-CT, p. 40, lines 15-22.

<sup>499</sup> T-134-CONF-FRA-CT, p. 43, lines 14-21 (quoted from para. 89 of the statement).

<sup>500</sup> T-134-CONF-FRA-CT, p. 44, lines 15-19.

would have been given a weapon<sup>501</sup> and asked to go and guard the residence of the party president.<sup>502</sup>

250. He contradicted his statement to the Office of the Prosecutor in 2007 by stating the following:

- Thomas Lubanga was visited by civilians at his residence.<sup>503</sup>
- He knew Chief Kahwa and Rafiki.<sup>504</sup>
- He fought in the battles between the UPC and the Ugandans in Bunia.<sup>505</sup>

251. The witness claimed to have been enlisted 3 times, each time at the end of the academic year.<sup>506</sup> Yet, the UPC did not have an armed force over a period of 3 years.

*- Participation in hostilities*

252. D01-0002, [REDACTED] of W-0213 [REDACTED],<sup>507</sup> confirmed that W-0213 had never belonged to an armed group,<sup>508</sup> and that he had never left [REDACTED] between 1995 and 2007.<sup>509</sup> This statement is also confirmed by Witnesses [REDACTED]<sup>510</sup> and [REDACTED].<sup>511</sup>

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<sup>501</sup> T-132-CONF-FRA-CT, p. 40, line 23, to p. 41, line 14.

<sup>502</sup> T-134-CONF-FRA-CT, p. 46, line 25, to p. 47, line 4.

<sup>503</sup> T-134-CONF-FRA-CT, p. 47, line 9, to p. 48, line 3.

<sup>504</sup> T-134-CONF-FRA-CT, p. 48, lines 4-24.

<sup>505</sup> T-134-CONF-FRA-CT, p. 52, line 12, to p. 53, line 15.

<sup>506</sup> The first time was in his 3<sup>rd</sup> year: T-132-CONF-FRA-CT, p. 7, lines 11-12. The second time was in his 4<sup>th</sup> year: *idem*, p. 23, lines 24-25. The third time, he was enlisted during the subsequent end-of-year exams: *idem*, p. 40, lines 11-17.

[REDACTED]. [REDACTED] confirmed that W-0213 was living in [REDACTED]'s home when he knew him in 1997-1998: [REDACTED]. Furthermore, he confirmed that D01-0002 was [REDACTED]: [REDACTED].

<sup>508</sup> [REDACTED].

<sup>509</sup> [REDACTED].

<sup>510</sup> [REDACTED] stated that he knew W-0213 because he [REDACTED]: [REDACTED]. He asserted that W-0213 was not a child soldier: [REDACTED].

<sup>511</sup> [REDACTED].

253. [REDACTED], [REDACTED], had known W-0213 since 1997-1998, when he used to come to visit [REDACTED] who lived on that avenue.<sup>512</sup> From about November 2003, [REDACTED].<sup>513</sup> He confirmed that W-0213 has never been a soldier.<sup>514</sup> W-0213 corroborated the testimony of [REDACTED] by confirming that [REDACTED] on which his uncle [REDACTED] used to live.<sup>515</sup>

### 2.5.3 Credibility of Witness D01-0002

254. The Prosecutor's allegations about the credibility of Witness D01-0002 are unfounded. D01-0002 answered all the Prosecutor's questions, although major interpretation problems,<sup>516</sup> highlighted on several occasions by the witness,<sup>517</sup> the Chamber,<sup>518</sup> the Defence<sup>519</sup> and the Prosecutor himself,<sup>520</sup> led to the repetition of certain questions,<sup>521</sup> which were sometimes wholly without basis.<sup>522</sup>

255. The Prosecutor misrepresents the facts (references provided in footnote 1472):

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<sup>512</sup> [REDACTED].

<sup>513</sup> [REDACTED].

<sup>514</sup> [REDACTED].

<sup>515</sup> T-133-CONF-FRA-CT, p. 30, lines 11-13.

<sup>516</sup> The serious interpretation problems which the witness had to contend with and which he raised on numerous occasions were interpreted by the Prosecutor as "evasive, defensive and argumentative" behaviour by the witness, para. 489. These significant interpretation errors are evident in the track-changed version of transcript T-238-CONF-FRA-CT. Transcript T-236-CONF-FRA was not revised. See the intervention of the Defence: T-238-CONF-FRA-CT2, p. 61, lines 12-21.

<sup>517</sup> For example: T-237-CONF-FRA-CT, p. 10, line 13; p. 16, lines 3 and 19; p. 17, line 19; p. 18, line 6, etc; T-238-CONF-FRA-CT2, p. 3, line 22; p. 4, line 16; p. 8, line 12; p. 14, line 17, etc.

<sup>518</sup> For example: T-237-CONF-FRA-CT, p. 25, lines 1-5; p. 40, lines 6-7; T-238-CONF-FRA-CT2, p. 39, lines 6-7, and p. 53, lines 2-4.

<sup>519</sup> For example: T-237-CONF-FRA-CT, p. 5, lines 8-14; p. 24, lines 17-25; T-238-CONF-FRA-CT2, p. 26, line 10, to p. 27, line 5.

<sup>520</sup> For example: T-237-CONF-FRA-CT, p. 17, lines 6-7; T-238-CONF-FRA-CT2, p. 22, line 5.

<sup>521</sup> For example: T-238-CONF-FRA-CT, p. 19, lines 5-10; p. 22, lines 7-14; p. 29, lines 11-14; p. 36, lines 6-7, 11-12 and 15-25; p. 56, lines 12-14.

<sup>522</sup> For example: T-238-CONF-FRA-CT2, p. 24, lines 16-20.

- 1<sup>st</sup> example: At the end of this exchange, Presiding Judge Fulford told the Prosecutor that he considered the witness to have answered the question.<sup>523</sup> The Prosecutor stated that he agreed with the Presiding Judge.<sup>524</sup>
- 2<sup>nd</sup> example: Regarding the feelings of [REDACTED] after the departure of W-0213, the witness stated: (1) that he could not know [REDACTED]'s feelings on the subject; (2) that each individual manifests sadness differently; and (3) that they went to see [REDACTED] to discuss the situation, which may demonstrate a feeling of sadness or anger.<sup>525</sup>
- 3<sup>rd</sup> example: Contrary to the Prosecutor's assertion, D01-0002 confirmed that he knew a [REDACTED], who did not, however, live on his avenue (the Prosecutor's previous question gave the false impression that [REDACTED] resided on [REDACTED] Avenue).<sup>526</sup>

256. Para. 490: The Prosecutor's allegation<sup>527</sup> that D01-0002 did not reveal to W-0213 that he had met the Defence team's resource person is not only irrelevant but is also unsubstantiated by the reference provided in the footnotes. Contrary to the Prosecutor's assertion, the witness did not advance a contradictory version of his departure from [REDACTED]. The witness instead clarified his answer of the previous day by stating precisely the areas through which he passed in travelling from [REDACTED] to [REDACTED], a journey which took him two weeks.

257. The Prosecutor's allegation that D01-0002 was allegedly pressurised or encouraged to lie during his testimony is wholly unfounded, since nothing in the record supports that argument.

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<sup>523</sup> T-237-CONF-FRA-CT, p. 23, lines 8-23.

<sup>524</sup> T-237-CONF-FRA-CT, p. 23, lines 24-25.

<sup>525</sup> T-238-CONF-FRA-CT2, p. 7, lines 7-23.

<sup>526</sup> [REDACTED]: [REDACTED] and [REDACTED]: [REDACTED].

<sup>527</sup> ICC-01/04-01/06-2748-CONF-FRA-CT, para. 490, footnote 1476.

#### 2.5.4 Contradictions between W-0321 and W-0213

258. W-0213 stated that when he met W-0321, W-0321 told him that he was looking for children who would give testimony before the Court.<sup>528</sup> This statement contradicts the testimony of W-0321, who claimed not to have told W-0213 that it was a matter of testimony before the Court.<sup>529</sup>
259. W-0321 claimed to have helped W-0213 to find his family when W-0213 came to the CTO (*Centre de transit et d'orientation* [Transit and Orientation Centre]).<sup>530</sup> Yet, it is clear from the testimony of W-0213 that he was already living with his family in [REDACTED], since he said that he had gone to the demobilization centre with children from his neighbourhood,<sup>531</sup> namely [REDACTED], [REDACTED],<sup>532</sup> and [REDACTED].<sup>533</sup>

#### 2.6 DRC-OTP-WWWW-0294 ([REDACTED])

260. Witness W-0294 used the military career of his brother, [REDACTED], as a basis for fabricating a mendacious account of fictitious military activities.<sup>534</sup> The Defence refers to its observations presented in its "Defence Application Seeking a Permanent Stay of the Proceedings" at paragraphs 131 to 137,<sup>535</sup> as well as paragraph 44 of its "*Réplique à la Prosecution's Response to the Defence's 'Requête de la Défense aux fins d'arrêt définitif des procédures'*".<sup>536</sup>

<sup>528</sup> T-133-CONF-FRA-CT, p. 46, lines 20-25.

<sup>529</sup> T-322-CONF-FRA-ET, p. 16, lines 6-12.

<sup>530</sup> T-309-CONF-FRA-ET, p. 24, lines 22-24.

<sup>531</sup> T-133-CONF-FRA-CT, p. 42, lines 13-18.

<sup>532</sup> T-133-CONF-FRA-CT, p. 38, lines 7-9, and p. 45, lines 16-23.

<sup>533</sup> T-133-CONF-FRA-CT, footnote 83. [REDACTED] ([REDACTED]) said [REDACTED]'s name was [REDACTED]: [REDACTED].

<sup>534</sup> See the following contradictions/implausibilities: the witness said that he started school at the age of 4: T-151-CONF-FRA-CT, p. 81, lines 7-24; inconsistency regarding the deaths of commander Pepe and commander Claude: T-152-CONF-FRA-CT, p. 4, line 21, to p. 7, line 20; on having participated in the fighting against the French: T-152-CONF-FRA-CT, p. 28, line 15, to p. 30, line 1.

<sup>535</sup> ICC-01/04-01/06-2657-Conf-tENG.

<sup>536</sup> ICC-01/04-01/06-2688-Conf.

261. The accounts [REDACTED] and W-0294 have many similarities which corroborate the Defence argument. They include the following:

- W-0294 stated that he had been called [REDACTED] since 2004-2005,<sup>537</sup> a name borne by [REDACTED], [REDACTED].<sup>538</sup>
- [REDACTED] was a soldier,<sup>539</sup> just as W-0294 claimed to be.<sup>540</sup>
- [REDACTED] was a soldier in the APC before joining the UPC.<sup>541</sup> When a question was put to him in this regard, W-0294 evaded the question and then finally acknowledged that he had been informed of the fact.<sup>542</sup> However, W-0294 also claimed that he started out as a soldier in the APC before joining the UPC.<sup>543</sup>
- W-0294 claimed to have provided training to recruits,<sup>544</sup> just like [REDACTED].<sup>545</sup>
- W-0294 claimed to have joined commander [REDACTED] to serve as his bodyguard<sup>546</sup> until his death.<sup>547</sup> [REDACTED] worked with commander [REDACTED] from 1999 until his death in 2002, first of all in the RCD, followed by the APC, the MLC, and finally in the UPC.<sup>548</sup> On this point, Witness W-0294 contradicted himself by stating first that he did not know whether [REDACTED] knew commander [REDACTED], and then adding:

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<sup>537</sup> T-150-CONF-FRA-CT, p. 44, lines 4-9. See also T-151-CONF-FRA-CT, p. 52, lines 16-24.

<sup>538</sup> [REDACTED].

<sup>539</sup> [REDACTED]; confirmed by [REDACTED] and [REDACTED]: W-0293: T-153-CONF-FRA-CT, p. 33, lines 14-16, and W-0294: T-151-CONF-FRA-CT, p. 71, lines 8-14.

<sup>540</sup> T-150-CONF-FRA-CT, p. 46, line 21.

<sup>541</sup> [REDACTED]: T-151-CONF-FRA-CT, p. 75, lines 19-20.

<sup>542</sup> T-151-CONF-FRA-CT, p. 75, lines 1-23.

<sup>543</sup> T-150-CONF-FRA-CT, p. 51, lines 1-7, and p. 72, lines 11-22.

<sup>544</sup> T-150-CONF-FRA-CT, p. 66, lines 8-13.

<sup>545</sup> [REDACTED].

<sup>546</sup> T-150-CONF-FRA-CT, p. 85, lines 10-12.

<sup>547</sup> T-151-CONF-FRA-CT, p. 27, line 16, to p. 28, line 2.

<sup>548</sup> [REDACTED].

“[TRANSLATION] when they were \* with the APC, yes they saw each other because [REDACTED] was his superior”.<sup>549</sup>

- [REDACTED] had been Thomas Lubanga’s bodyguard,<sup>550</sup> as confirmed by [REDACTED].<sup>551</sup> Yet, W-0294 also claimed to have guarded the residence of Thomas Lubanga.<sup>552</sup>
- W-0294 stated that he left the UPC after the battle of Bunia,<sup>553</sup> just like [REDACTED].<sup>554</sup>
- Whilst under the impression that [REDACTED] was in PUSIC,<sup>555</sup> W-0294 claimed that he himself joined the PUSIC forces.<sup>556</sup>

262. As W-0294 himself acknowledged, he had, in the past, given false statements in a bid to obtain certain benefits:

- The witness first of all claimed not to know the armed group in which his brother had worked<sup>557</sup> and not to know his brother’s position.<sup>558</sup> W-0294 then explained that he had not “[TRANSLATION] wished to say it here”, but confirmed that he knew that his brother was in the APC, and in the UPC.<sup>559</sup>
- He admitted to giving false statements to the demobilization NGO by sketching [REDACTED]’s house in [REDACTED],<sup>560</sup> whereas he stated that [REDACTED] had no house and was not living in [REDACTED].<sup>561</sup>

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<sup>549</sup> T-151-CONF-FRA CT, p. 74, lines 16-23, and p. 79, line 24, to p. 80, line 3.

<sup>550</sup> [REDACTED].

<sup>551</sup> T-151-CONF-FRA-CT, p. 77, lines 2-4.

<sup>552</sup> T-151-CONF-FRA-CT, p. 33, lines 2-21.

<sup>553</sup> T-151-CONF-FRA-CT, p. 36, line 22, to p. 38, line 9.

<sup>554</sup> [REDACTED].

<sup>555</sup> T-151-CONF-FRA-CT, p. 78, lines 5-9.

<sup>556</sup> T-151-CONF-FRA-CT, p. 38, line 22, to p. 39, line 8.

<sup>557</sup> T-151-CONF-FRA-CT, p. 73, lines 8-10.

<sup>558</sup> T-151-CONF-FRA-CT, p. 74, lines 4-10.

<sup>559</sup> T-151-CONF-FRA-CT, p. 75, lines 19-23, and p. 77, lines 13-24.

<sup>560</sup> EVD-D01-00225. See T-151-CONF-FRA-CT, p. 97, lines 7-19.

<sup>561</sup> T-151-CONF-FRA-CT, p. 96, lines 12-14, and p. 97, lines 11-15.

- He admitted to providing false information which was recorded on the family reunification certificate.<sup>562</sup>
- He falsely stated to Ms Kristine Peduto and [REDACTED] staff that the person who accompanied him, a certain [REDACTED], was his brother,<sup>563</sup> but could not explain why he had told such a lie.<sup>564</sup>

263. In any event, the statements of the witness are replete with implausibilities, contradictions and inconsistencies which confirm that the witness, who was not under the age of 15 years in 2002-2003, lied to the Chamber about his identity, his recruitment by the FPLC, and his participation in hostilities.

264. This is certainly the reason why during his testimony, Witness W-0294 requested to re-read his written statement because he wished to “[TRANSLATION] verify some facts”.<sup>565</sup>

*- His statements about his age*

265. W-0294 claimed to have been born on [REDACTED] 1991.<sup>566</sup>

266. The documentary evidence presented before the Chamber establishes that the statements of W-0294 on this point are manifestly mendacious, as set out below.

- The voting card issued on [REDACTED] 2005 and the extract of the IEC register both bear the date of [REDACTED] 1987,<sup>567</sup>
- The family reunification certificate shows that in July 2004, W-0294 was 16 years old,<sup>568</sup>

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<sup>562</sup> See, for example, T-151-CONF-FRA-CT, p. 61, lines 16-19, about EVD-D01-00069.

<sup>563</sup> T-152-CONF-FRA-CT, p. 32, lines 7-18.

<sup>564</sup> T-152-CONF-FRA-CT, p. 32, lines 19-23, and p. 34, lines 7-11.

<sup>565</sup> T-151-CONF-FRA-CT, p. 2, lines 2-14, and p. 52, lines 7-10.

<sup>566</sup> T-150-CONF-FRA-CT, p. 44, line 21.

<sup>567</sup> EVD-D01-00764 and EVD-D01-01006. The date of [REDACTED] features on the IEC extract.

<sup>568</sup> EVD-D01-00069.

- The attestation for the first school leaving certificate shows that the witness was born in [REDACTED] on [REDACTED] 1988;<sup>569</sup>
- The [REDACTED] school list of registered pupils for 2000 mentions a [REDACTED], born in [REDACTED] on [REDACTED] 1988.<sup>570</sup>

267. As shown above, W-0294 was not born in 1991 as he claimed.

*- His school attendance*

268. Not only did the witness claim to have started his studies in the 2<sup>nd</sup> year of primary school, which is already exceptional, but he also alleged to have done so at the age of [REDACTED].<sup>571</sup> Yet, as Witness D01-0029 stated, a child can enter the first year of primary school only after the age of 6 years.<sup>572</sup>

269. Evidently, Witness W-0294 tried to hide his true school attendance to avoid any inconsistency with the date of birth he had provided to the Office of the Prosecutor.

270. During the cross-examination, when the Defence questioning challenged the probability of his account, W-0294 stated that he did not wish to answer any questions about age.<sup>573</sup> Moreover, the witness was incapable of providing details about his school attendance.<sup>574</sup> W-0293, the mother of W-0294, could not provide any clarifications regarding her son's statements.<sup>575</sup>

271. Yet, contrary to the statement of W-0294, the school documents admitted into the record of the case show that the pupil named [REDACTED] attended school

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<sup>569</sup> EVD-D01-00071. W-0294 acknowledged that this was his certificate, his name, his year of enrolment in that school and the mark he obtained: T-151-CONF-FRA-CT, p. 85, lines 5-16.

<sup>570</sup> EVD-D01-00072, p. 2, line 13. T-151-CONF-FRA-CT, p. 85, line 17, to p. 87, line 13. The document mentions that [REDACTED], born in [REDACTED], completed his 6<sup>th</sup> year in [REDACTED]. However, the witness stated that he completed his 6<sup>th</sup> year in [REDACTED].

<sup>571</sup> T-151-CONF-FRA-CT, p. 81, lines 2-9.

<sup>572</sup> T-293-CONF-FRA-CT, p. 11, lines 4-7.

<sup>573</sup> T-151-CONF-FRA-CT, p. 82, line 19, to p. 83, line 2.

<sup>574</sup> T-151-CONF-FRA-CT, p. 83, lines 1-10.

<sup>575</sup> T-153-CONF-FRA CT, p. 36, line 2, to p. 37, line 13.

normally and completed his 6<sup>th</sup> year at [REDACTED] school at the age of 11 or 12 years.<sup>576</sup> Moreover, the witness recognizes the first school leaving certificate and the information recorded therein, apart from his date of birth.<sup>577</sup>

*- His mother and his military activities*

272. The numerous contradictions, inconsistencies or implausibilities regarding his alleged military activities within the armed wing of the UPC which were observed in general in his testimony support the view that the witness lied about his enlistment into the armed forces of the UPC.

273. For example:

- On the family reunification certificate, W-0294 provided a false name for his mother ([REDACTED]).<sup>578</sup> W-0294 explained that it was the name of the boy who accompanied him to [REDACTED].<sup>579</sup> However, the mother of the witness, W-0293, stated that it was in fact the name of W-0294's grandmother.<sup>580</sup>
- W-0294 claimed that he did not see [REDACTED] whilst he was in the UPC army. In the screening notes prepared by Witness W-0581 after meeting with W-0294 in November 2007, it is stated that W-0294 said he had been trained by "[REDACTED]".<sup>581</sup> This was in fact the military code name [REDACTED].<sup>582</sup>

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<sup>576</sup> EVD-D01-00072, p. 2, line 13. T-151-CONF-FRA-CT, p. 85, line 17, to p. 87, line 13. The document states that [REDACTED], born in [REDACTED], completed his 6<sup>th</sup> year in [REDACTED]. However, the witness stated that he completed his 6<sup>th</sup> year in [REDACTED].

<sup>577</sup> EVD-D01-0007; T-151-CONF-FRA-CT, p. 85, lines 7-9.

<sup>578</sup> EVD-D01-00069.

<sup>579</sup> T-151-CONF-FRA-CT, p. 66, lines 12-16.

<sup>580</sup> T-153-CONF-FRA-CT, p. 30, lines 2-9.

<sup>581</sup> EVD-D01-00319, para. 18.

<sup>582</sup> [REDACTED].

- W-0294 claimed in his testimony that he did not participate in a battle against the French,<sup>583</sup> contrary to his statements to W-0581<sup>584</sup> and to Office of the Prosecutor investigators<sup>585</sup> in November 2007.
- In November 2007, he stated that he had been trained in the Nyankunde military camp,<sup>586</sup> which contradicts his statements before the Chamber.<sup>587</sup> In fact, most of the information the witness provided to W-0581 in November 2007 is different from the information provided before the Chamber.<sup>588</sup>
- It is improbable that commander Pepe asked him to provide military training at Rwabisengo when the witness had never been a soldier and, by his own reckoning, was aged 10 years.<sup>589</sup>

274. Moreover, W-0031, from the NGO [REDACTED], said that he conducted no verification for W-0294, and according to him, such verifications had been conducted by MONUC.<sup>590</sup> Yet, Ms Kristine Peduto, a MONUC employee, confirmed that no additional verification was conducted by her services.<sup>591</sup>

275. The witness's statements are vague<sup>592</sup> and inconsistent, which makes it especially difficult for the Defence to verify them. For example:

- W-0294 claimed that the soldiers he met in 2000 were from the APC.<sup>593</sup> Yet, the APC was not in existence at that time.

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<sup>583</sup> T-151-CONF-FRA-CT, p. 40, lines 18-19; T-152-CONF-FRA-CT, p. 28, lines 17-18.

<sup>584</sup> EVD-D01-00319, para. 24. Date of meeting with W-0581: T-301-CONF-FRA-CT, p. 27, lines 19-25.

<sup>585</sup> T-152-CONF-FRA-CT, p. 28, line 19, to p. 30, line 1 (quotation of paras. 129-130 of the statement).

<sup>586</sup> EVD-D01-00319, para. 17.

<sup>587</sup> The witness said he was trained in Mandro. T-151-CONF-FRA-CT, p. 99, lines 14-23, and T-152-CONF-FRA-CT, p. 2, lines 6-14.

<sup>588</sup> See EVD-D01-00319, paras. 17, 18, 20, 21, etc.

<sup>589</sup> T-150-CONF-FRA-CT, p. 66, lines 8-13, and p. 52, lines 6-8.

<sup>590</sup> T-202-CONF-FRA-ET, p. 77, lines 1-10.

<sup>591</sup> T-206-CONF-FRA-ET, p. 10, lines 1-7.

<sup>592</sup> For example: T-152-CONF-FRA-CT, p. 5, line 2; p. 6, lines 4-6; p. 7, lines 1-4; p. 7, line 17; p. 7, line 25, to p. 8, line 4; p. 8, lines 7-8; p. 8, lines 18-20.

<sup>593</sup> T-150-CONF-FRA-CT, p. 47, line 2, and p. 51, line 7.

- W-0294 stated that during the same battle, Lompondo was driven out of Bunia and that commander Claude was killed.<sup>594</sup> However, commander Claude was killed during an exchange of gunfire in April 2002 and Lompondo was driven out of Bunia in August 2002.
- After the capture of Bunia but before the death of Bagonza, W-0294 claimed that the G2 of the FPLC general staff was Lobo.<sup>595</sup> However, the G2 was Idriss Bobale, followed by Ali Mbuyi.<sup>596</sup> Commander Lobo was appointed G2 after the departure of Ali Mbuyi in March 2003.<sup>597</sup>
- W-0294 claimed that he arrived in Bunia after the death of commander Pepe, but shortly before the death of commander Claude. However, a time gap of over one year separates these two events.

276. Furthermore, Witness D01-0026 highlights the mendaciousness of the stratagems used by Witness W-0294<sup>598</sup> to lend credence to his account.<sup>599</sup> [REDACTED]<sup>600</sup> [REDACTED],<sup>601</sup> W-0294 was unable to identify one of the individuals in the photograph,<sup>602</sup> and remained vague as to the circumstances in which he obtained it.<sup>603</sup> Moreover, [REDACTED].<sup>604</sup>

277. D01-0026 unequivocally stated that [REDACTED], W-0294, had never been a soldier<sup>605</sup> and that he had never worked for commander [REDACTED],<sup>606</sup> with

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<sup>594</sup> T-150-CONF-FRA-CT, p. 82, lines 1-3.

<sup>595</sup> T-150-CONF-FRA-CT, p. 85, line 24 (Lobo G2); p. 82, lines 12-13 (after Lompondo fled).

<sup>596</sup> W-0055: T-175-CONF-FRA-CT, p. 18, lines 7-11; T-174-CONF-FRA-CT, p. 43, lines 5-9. W-0016: T-189-CONF-FRA-CT, p. 5, lines 21-23.

<sup>597</sup> D01-0019: T-342-FRA-ET, p. 33, lines 26-28.

<sup>598</sup> W-0294: T-150-CONF-FRA-CT, p. 67, lines 19-24, and p. 69, lines 12-22, regarding EVD-OTP-00390.

<sup>599</sup> See [REDACTED].

<sup>600</sup> [REDACTED].

<sup>601</sup> [REDACTED].

<sup>602</sup> T-150-CONF-FRA-CT, p. 69, lines 20-22.

<sup>603</sup> T-150-CONF-FRA-CT, p. 67, lines 21-24.

<sup>604</sup> [REDACTED].

<sup>605</sup> T-251-CONF-FRA-CT, p. 34, lines 8-10, and p. 36, lines 11-26; T-253-CONF-FRA-CT, p. 22, lines 14-16.

<sup>606</sup> T-251-CONF-FRA-CT, p. 34, lines 15-21.

whom [REDACTED].<sup>607</sup> Contrary to the Prosecutor's claims, D01-0026 stated that "[TRANSLATION] all of the people can testify that [REDACTED] was never a soldier".<sup>608</sup>

278. At paragraph 371, the Prosecutor erroneously claims that D01-0026 conceded that everyone in Ituri was saying that W-0294 was a soldier. However, this inaccurate interpretation by the Prosecutor stems from the following sentence: "[TRANSLATION] Unless I am mistaken, in Ituri, there was a battle going on and everyone was saying he was a soldier",<sup>609</sup> which clearly means that everyone in Ituri was claiming to be a soldier. Moreover, the witness specifically rejected the Prosecutor's interpretation by pointing out that the Prosecutor had not understood him clearly.<sup>610</sup>
279. [REDACTED] further stated that W-0294 fled from [REDACTED] with the rest of his family to seek refuge in [REDACTED],<sup>611</sup> an assertion which is corroborated by the mother [REDACTED].<sup>612</sup> However, W-0294 claimed to have been enlisted into the APC in [REDACTED], and to have subsequently followed commander [REDACTED] of the APC to [REDACTED] in Uganda.<sup>613</sup> [REDACTED] during the 2000-2005 period,<sup>614</sup> W-0294 remained evasive on the contact he had with [REDACTED].<sup>615</sup>
280. Lastly, contrary to the allegation of the Office of the Prosecutor, D01-0026 was in a position to realise that [REDACTED] was not with commander [REDACTED], since [REDACTED]. Moreover, he was in a position to state that W-0294 was in

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<sup>607</sup> [REDACTED].

<sup>608</sup> T-253-CONF-FRA-CT, p. 24, line 18, to p. 25, line 2.

<sup>609</sup> T-253-CONF-FRA-CT, p. 24, lines 24-25.

<sup>610</sup> T-253-CONF-FRA-CT, p. 25, line 5.

<sup>611</sup> [REDACTED].

<sup>612</sup> T-153-CONF-FRA-CT, p. 40, line 24, to p. 41, line 25.

<sup>613</sup> T-150-CONF-FRA-CT, p. 61, line 15, to p. 65, line 24.

<sup>614</sup> For example: T-251-CONF-FRA-CT, p. 33, line 21, to p. 34, line 6.

<sup>615</sup> [REDACTED].

[REDACTED] in 2002-2003,<sup>616</sup> and even stated that he saw him there and [REDACTED].<sup>617</sup>

## 2.7 DRC-OTP-WWWW-0297 ([REDACTED])

### 2.7.1 The statements given to the Defence in December 2009

281. Witness W-0297 was on the list of Prosecution witnesses until April 2009.<sup>618</sup>
282. On 3 and 4 December 2009, the Defence met W-0297 as part of its investigations into the conduct of Intermediary W-0321 of the Office of the Prosecutor. At the time the witness stated:
- “[TRANSLATION] So he [W-0321] told me that when I appear before the judges, where Papa Thomas was arrested, I have to tell them that I was forcibly recruited.”<sup>619</sup>
  - According to W-0321: “[TRANSLATION] [...] if we go and testify against Thomas, if he is found guilty we will be given money.”<sup>620</sup>
283. After this meeting, the Defence requested that he be allowed to appear before the Chamber.<sup>621</sup>
284. W-0297 was thus called to give evidence in May 2010, following the announcement by the Defence of its lines of defence,<sup>622</sup> and following the testimony of [REDACTED] and [REDACTED] which implicated W-0321 and revealed the lies told by W-0297.

<sup>616</sup> T-251-CONF-FRA-CT, p. 17, line 16, to p. 19, line 7.

<sup>617</sup> T-251-CONF-FRA-CT, p. 19, lines 3-4 and lines 12-16.

<sup>618</sup> On 8 April 2009, the Office of the Prosecutor informed the Chamber that it wished to remove Witness W-0297 from its list of witnesses, T-167-FRA-ET, p. 19, lines 7-11.

<sup>619</sup> EVD-D01-00190, p. 0118, lines 676-687, and T-288-CONF-FRA-ET, p. 24, lines 2-9.

<sup>620</sup> T-289-CONF-FRA-ET, p. 4, line 4, to p. 6, line 1, and EVD-D01-00191, pp. 0126-0127 (W-0297). The exact reference for the quotation: T-289-CONF-FRA-ET, p. 4, lines 8-9, and EVD-D01-00191, p. 0126, lines 0143-0144.

<sup>621</sup> ICC-01/04-01/06-2307-Conf.

<sup>622</sup> The Defence announced its main lines of defence in its opening remarks, which included the demonstration of the fact that some Office of the Prosecutor intermediaries incited young people to pose as former child soldiers before the Chamber: T-236-CONF-FRA-ET, p. 21, line 20, to p. 26, line 9.

285. On this occasion, W-0297 retracted his statement, specifically with regard to (1) the promises made by W-0321,<sup>623</sup> (2) the circumstances of his enlistment,<sup>624</sup> and (3) the death of his mother.<sup>625</sup>
286. W-0297 provided no convincing explanation to justify the specific aspects of his statements of December 2009, merely alleging that he was afraid of the Defence counsel.<sup>626</sup> However, contrary to what the witness claimed,<sup>627</sup> the Victims and Witnesses Unit explained the purpose of the meeting to W-0297 several times prior to it taking place. The VWU then obtained his consent when the meeting took place.
287. In addition, the witness denied stating that W-0321 allegedly told him that if W-0297 testified against Thomas Lubanga, and he were found guilty, he would receive money.<sup>628</sup>
288. The conditions under which the interview with the Defence took place afford a high degree of credibility to the statements made by the witness on this occasion and on this subject. In particular, it should be noted that he spontaneously mentioned the role played by W-0321 in fabricating his misleading statements.
289. In any event, the attitude of W-0297 whilst giving evidence, the numerous contradictions, inconsistencies and implausibilities between his various statements, together with the contradictions with the testimony of W-0321 on fundamental aspects of their testimony, reveal the manoeuvres of W-0321 and

<sup>623</sup> T-289-CONF-FRA-ET, p. 3, line 3, to p. 6, line 1, and EVD-D01-00191, pp. 0126-0127, lines 133-152.

<sup>624</sup> T-288-CONF-FRA-ET, p. 21, line 12, to p. 27, line 8, and EVD-D01-00190, pp. 0117-0118, lines 661-696, and p. 0119, lines 711-721.

<sup>625</sup> T-290-CONF-FRA-ET, p. 14, line 2, to p. 20, line 19, and p. 22, line 1, to p. 23, line 3; EVD-D01-00150, pp. 0064-0065, lines 0412-0457 and pp. 0068-0069, lines 0565-0576.

<sup>626</sup> T-288-CONF-FRA-ET, p. 25, lines 3-8. The witness explains that he lied to the Defence counsel because he was afraid. Such an explanation cannot be valid since the witness was not afraid of telling the Defence that he had been a child soldier: T-288-CONF-FRA-ET, p. 27, line 10, to p. 29, line 24.

<sup>627</sup> T-292-CONF-FRA-ET, p. 9, line 19, to p. 10, line 24.

<sup>628</sup> T-289-CONF-FRA-ET, p. 4, line 4, to p. 6, line 1 (excerpt from EVD-D01-00191, pp. 0126-0127, lines 143-148).

his influence on Witness W-0297, who made manifestly mendacious statements before the Chamber.

290. The Defence refers in this regard to paragraphs 81 to 126 of its “Defence Application Seeking a Permanent Stay of the Proceedings”<sup>629</sup> and to paragraphs 32 to 36 of its “*Réplique à la ‘Prosecution’s Response to the Defence’s ‘Requête de la Défense aux fins d’arrêt définitif des procédures’*”.<sup>630</sup>
291. The Defence wishes to submit the following additional observations.

### **2.7.2 The contradictions, inconsistencies and implausibilities in his statements**

292. The mendaciousness of the statements made by W-0297 is confirmed by the significant contradictions between the various statements regarding essential information, and is corroborated by the testimonial and documentary evidence registered in the record of the case.

#### *- His civil status*

293. Witness W-0297 claimed that his name is [REDACTED]<sup>631</sup> and that in May 2010 he was twenty years of age. However, he was unable to provide his exact date of birth.<sup>632</sup>
294. Yet, Witnesses [REDACTED] and [REDACTED] stated that W-0297 is called [REDACTED], and that “[TRANSLATION] he decided to call himself [REDACTED]”.<sup>633</sup> Only the names [REDACTED] appear on his school documents.<sup>634</sup> This piece of information corroborates the testimony of D01-

<sup>629</sup> ICC-01/04-01/06-2657-Conf-tENG.

<sup>630</sup> ICC-01/04-01/06-2688-Conf.

<sup>631</sup> T-285-CONF-FRA-CT, p. 7, line 15.

<sup>632</sup> T-285-CONF-FRA-CT, p. 7, lines 17-24.

<sup>633</sup> [REDACTED].

<sup>634</sup> EVD-D01-00144, p. [REDACTED]; EVD-D01-00146, [REDACTED]; EVD-D01-00147, p. [REDACTED]; EVD-D01-00145, p. [REDACTED].

0004 and D01-0003, who stated that W-0321 had encouraged them to lie about their identity.<sup>635</sup>

295. It is not in dispute that [REDACTED] introduced himself to the investigators from the Office of the Prosecutor, falsely claiming to be the father of Witness W-0297.<sup>636</sup> He introduced himself to the investigators as [REDACTED],<sup>637</sup> the name of the father of W-0297.<sup>638</sup> [REDACTED] stated that he and W-0297 were encouraged to lie about this by Intermediary W-0321.<sup>639</sup> W-0581 confirmed that Intermediary W-0321 introduced [REDACTED] to him as the father of W-0297.<sup>640</sup>

296. As far as the date of birth of W-0297 is concerned, the enrolment register for [REDACTED], which includes the name of [REDACTED],<sup>641</sup> showed that he was born in [REDACTED] in 1986; his father was called [REDACTED] and his mother [REDACTED]; and that he lived at [REDACTED].

297. This document proves that W-0297 registered in the 2<sup>nd</sup> year in 1997, when he was 11 years old. This information corroborates the testimony of W-0297, who stated that he was 11 years old in the 2<sup>nd</sup> year.<sup>642</sup>

298. Although Witness [REDACTED] was not in a position to state accurately the age of W-0297,<sup>643</sup> he confirmed that the witness studied at [REDACTED] before the war, thus corroborating the school record.<sup>644</sup>

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<sup>635</sup> [REDACTED].

<sup>636</sup> Investigators' note: EVD-D01-00335. W-0581: T-301-CONF-FRA ET, p. 31, lines 21 *et seq.*

<sup>637</sup> For example: EVD-OTP-00526 ([REDACTED]). W-0581: T-301-CONF-FRA ET, p. 31, lines 21 *et seq.*

<sup>638</sup> T-285-CONF-FRA-CT, p. 8, lines 5-7.

<sup>639</sup> T-239-CONF-FRA-CT2, p. 57, line 22, to p. 58, line 1.

<sup>640</sup> T-301-CONF-FRA-CT, p. 31, line 18, to p. 32, line 15. This information is contradicted by Intermediary W-0321, who confirmed that he knew that [REDACTED] was the uncle of W-0297. T-310-CONF-FRA-ET, p. 4, lines 22 *et seq.*

<sup>641</sup> EVD-D01-00145, pp. [REDACTED], No. [REDACTED].

<sup>642</sup> T-289-CONF-FRA-ET, p. 9, lines 3-15.

<sup>643</sup> [REDACTED]: he stated that W-0297 was born around 19 or 20 years ago.

<sup>644</sup> T-239-CONF-FRA-CT2, p. 16, lines 4-10.

299. According to this information, he was therefore 24 years of age when he gave evidence.

*- His place of birth and home address*

300. The witness stated that he was born in [REDACTED] and lived in [REDACTED]<sup>645</sup> until fighting forced him to move with his family to the [REDACTED] neighbourhood of [REDACTED].<sup>646</sup> The witness's statements about the time when he allegedly moved to [REDACTED] with his family were confused.<sup>647</sup>

301. The evidence shows that Witness W-0297 was in fact born in [REDACTED] and that he lived there until he was relocated by the Office of the Prosecutor in 2008:

- W-0297 stated in December 2007 that he was born in [REDACTED], not [REDACTED].<sup>648</sup>
- W-0297 stated that he had studied in [REDACTED] from 2004 until 2006.<sup>649</sup>
- [REDACTED] stated that Witness W-0297 was born in [REDACTED] and that he had lived in the [REDACTED] neighbourhood since he was born.<sup>650</sup>
- [REDACTED] confirmed that he and W-0297 were both living in [REDACTED] when they were approached by W-0321 with a view to falsely claiming to have been child soldiers.<sup>651</sup> He added that W-0321 had asked them not to reveal that they lived in [REDACTED].<sup>652</sup>

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<sup>645</sup> T-289-CONF-FRA-ET, p. 8, line 1.

<sup>646</sup> T-289-CONF-FRA-ET, p. 8, lines 6-12.

<sup>647</sup> T-289-CONF-FRA-ET, p. 8, lines 14-21.

<sup>648</sup> EVD-OTP-00563, p. 0130, para. 8.

<sup>649</sup> T-289-CONF-FRA-ET, p. 17, lines 11-12, and p. 24, lines 21-24. He also stated that in 2005 he was in [REDACTED]; T-291-CONF-FRA-ET, p. 9, lines 22-23.

<sup>650</sup> [REDACTED].

<sup>651</sup> [REDACTED]; [REDACTED].

<sup>652</sup> T-242-CONF-FR-CT2, p. 7, line 19, to p. 8, line 6.

- The school records show that W-0297 studied in [REDACTED] between 1997 and 2001.<sup>653</sup> Specifically, the enrolment register for [REDACTED] states that in 1997 W-0297 lived in [REDACTED], and that he was born in [REDACTED].<sup>654</sup>
- [REDACTED] ([REDACTED]) has been [REDACTED] since 2003; [REDACTED] in the [REDACTED] neighbourhood in [REDACTED], where he has lived since 1996.<sup>655</sup> He stated that he had known W-0297<sup>656</sup> since his arrival in [REDACTED] in 1996,<sup>657</sup> in particular because he studied with his children at [REDACTED] primary school.<sup>658</sup> [REDACTED] stated that the father of W-0297 was called [REDACTED] and that his mother was called [REDACTED].<sup>659</sup> He stated that he lived in [REDACTED], [REDACTED] avenue, during the war, in 2002-2003, and in 2007.<sup>660</sup>
- The father of W-0297, [REDACTED],<sup>661</sup> is mentioned in the notebook<sup>662</sup> in which [REDACTED],<sup>663</sup> thus demonstrating that he and his family lived in [REDACTED] avenue in the [REDACTED] neighbourhood in 2007.
- W-0297 stated that he lived in [REDACTED] in November 2007.<sup>664</sup>

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<sup>653</sup> EVD-D01-00144, p. [REDACTED]. These are the annual results records for the 1996-1997 academic year at [REDACTED]. The name of W-0297 is listed under Class [REDACTED], under the heading "[REDACTED]"; EVD-D01-00146: W-0297 was registered in 1999-2000 at [REDACTED]; EVD-D01-00147, p. [REDACTED]. W-0297 was registered in 2000-2001 at [REDACTED], see Class [REDACTED]; EVD-D01-00145, p. [REDACTED]: W-0297 is listed under No. [REDACTED]: Enrolment register for [REDACTED], which shows that W-0297 was enrolled at that school in 1997 and that he came [REDACTED].

<sup>654</sup> EVD-D01-00145, pp. [REDACTED], No. [REDACTED].

<sup>655</sup> [REDACTED].

<sup>656</sup> He recognized W-0297 in photograph EVD-OTP-00562. [REDACTED].

<sup>657</sup> [REDACTED].

<sup>658</sup> [REDACTED].

<sup>659</sup> [REDACTED].

<sup>660</sup> [REDACTED].

<sup>661</sup> W-0297: T-285-CONF-FRA-CT, p. 8, line 5. [REDACTED]: [REDACTED].

<sup>662</sup> EVD-D01-01099, p. [REDACTED]. [REDACTED]: [REDACTED].

<sup>663</sup> [REDACTED].

<sup>664</sup> W-0297 claimed that W-0321 came to find him at home in [REDACTED] to ask him if he wanted to go to [REDACTED]. T-287-CONF-FRA-CT, p. 34, lines 2-5; T-285-CONF-FRA-CT, p. 8, lines 9-10; T-291-CONF-FRA-ET, p. 9, lines 22-3. Afterwards, W-0297 stated that he had not met W-0321 in [REDACTED]. *Idem*, line 24, to p. 10, line 7.

- The testimony of W-0321 himself clearly shows that W-0297 lived in [REDACTED], and more specifically in the [REDACTED] neighbourhood.<sup>665</sup>

302. The witness's statements about his school attendance show an attempt to reconcile the conflicting versions he provided in December 2009 with the version he provided in 2007 and 2008. In order to conceal the truth, the witness claimed that after the war he repeated all the primary school studies he had already completed.<sup>666</sup>

303. Yet, not only does this version seem unlikely, but the evidence also shows that W-0297 had lived in [REDACTED] since he was born, and as a result had undergone all his primary education there, specifically between 1996 and 2001:

- 1996-1997 academic year: W-0297 studied at [REDACTED] in the 2<sup>nd</sup> year of primary school and failed the year;<sup>667</sup>
- 1997-1998 academic year: W-0297 was enrolled in the 2<sup>nd</sup> year at [REDACTED] after transferring from [REDACTED];<sup>668</sup>
- 1999-2000 academic year: W-0297 was enrolled in the 3<sup>rd</sup> year at [REDACTED];<sup>669</sup>
- 2000-2001 academic year: W-0297 was enrolled in the 3<sup>rd</sup> year at [REDACTED] in 2000-2001.<sup>670</sup>

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<sup>665</sup> W-0321 stated that W-0297 moved to [REDACTED] in late November, early December 2007. T-322-CONF-FRA-ET, p. 24, lines 4-9. He stated that he met W-0297 in [REDACTED] when W-0297 [REDACTED], to talk to him about the trip to [REDACTED], and he added that he went with him "[TRANSLATION] to their home, where he was living in [REDACTED]", EVD-D01-00348, p. 0105, line 873-876, and T-322-CONF-FRA-ET, p. 36, lines 8-27.

<sup>666</sup> T-289-CONF-FRA-ET, p. 11, lines 14-19, and p. 17, lines 11-12.

<sup>667</sup> EVD-D01-00144, p. [REDACTED]: annual results record, the name of W-0297 is mentioned under Class [REDACTED], No. [REDACTED], under the heading "[REDACTED]".

<sup>668</sup> EVD-D01-00145, p. [REDACTED], No. [REDACTED].

<sup>669</sup> EVD-D01-00146, No. [REDACTED].

<sup>670</sup> EVD-D01-00147, p. [REDACTED], No. [REDACTED].

304. When examined about the educational establishments he allegedly attended before the war, the witness was unable to provide details about the name of his school, the name of the head teacher, or the names of his teachers.<sup>671</sup> Confronted with the above-mentioned school records, the witness provided conflicting details, for example by stating that he was at [REDACTED] school ([REDACTED]) in 2002.<sup>672</sup>
305. The witness also stated that he was enlisted in Ngudjolo's army for 3 months in 2005,<sup>673</sup> which contradicts the information he provided about his school attendance.<sup>674</sup>
306. From a general point of view, the testimony of [REDACTED] contradicts the witness's statements about his school attendance.<sup>675</sup>

*- His enlistment*

307. W-0297 also claimed that he was enlisted twice by UPC soldiers.<sup>676</sup>
308. His uncle ([REDACTED]) and one of his friends ([REDACTED]) testified that he was not a soldier in the UPC armed wing.<sup>677</sup>
309. Their testimony was categorically corroborated by Witness [REDACTED], [REDACTED], [REDACTED], who had known Witness W-0297 since 1996.<sup>678</sup> In this

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<sup>671</sup> For example, T-289-CONF-FRA-ET, p. 10, lines 6-13. The witness no longer remembered the name of his school or the names of his teachers.

<sup>672</sup> T-289-CONF-FRA-ET, p. 16, lines 16-17. [REDACTED] school is also known as [REDACTED] because it is one of the [REDACTED] schools: T-289-CONF-FRA-ET, p. 13, lines 1-3, and p. 17, line 24, to p. 18, line 7.

<sup>673</sup> T-291-CONF-FRA-ET, p. 9, lines 1-5.

<sup>674</sup> He stated that he resumed his studies in 2004 until 2006: T-289-CONF-FRA-ET, p. 17, lines 11-12, and p. 24, lines 13-24.

<sup>675</sup> [REDACTED] claimed that W-0297 attended the [REDACTED] school in [REDACTED] and finally [REDACTED]. [REDACTED].

<sup>676</sup> T-285-CONF-FRA-CT, p. 43, lines 11-15; T-286-CONF-FRA-CT, p. 6, lines 19-24, p. 13; lines 22-4, and p. 14, lines 14-17.

<sup>677</sup> [REDACTED] confirmed that W-0297 had never been a child soldier, nor had all the other children approached by W-0321 in the neighbourhood, including [REDACTED] and [REDACTED]: [REDACTED]. Confirmed by [REDACTED]: [REDACTED].

<sup>678</sup> [REDACTED].

regard, he confirmed that the witness had never been a soldier in the UPC armed forces.<sup>679</sup>

310. These testimonies are corroborated by the numerous weaknesses in the testimony of W-0297. The numerous contradictions, inconsistencies and implausibilities on essential aspects of his testimony, which were revealed by the Defence's cross-examination, show its mendaciousness. In particular:

- When giving evidence, W-0297 stated that he had been enlisted at the time when the UPC controlled Bunia,<sup>680</sup> whereas he claimed the contrary in his interview with the investigators of the Office of the Prosecutor in 2007.<sup>681</sup>
- During his meeting with the investigators from the Office of the Prosecutor in 2007, W-0297 did not specify that he had been forcibly enlisted at his school in [REDACTED] and that he had then escaped to return to [REDACTED]. If an event of this magnitude had genuinely occurred, the witness would not have failed to mention it.<sup>682</sup>
- When giving evidence, W-0297 stated that he had been taken to the [REDACTED] football field, where there was a training camp,<sup>683</sup> whereas during his interviews with Defence counsel in December 2009, the witness stated that he had been taken to [REDACTED] camp to undergo training.<sup>684</sup>
- W-0297 stated that when he left the UPC, he asked for commander Bosco's permission to leave the camp. However, in March 2008, the

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<sup>679</sup> [REDACTED].

<sup>680</sup> T-285-CONF-FRA-CT, p. 45, lines 13-14.

<sup>681</sup> T-290-CONF-FRA-ET, p. 10, line 13, to p. 11, line 5.

<sup>682</sup> T-290-CONF-FRA-ET, p. 3, line 15, to p. 4, line 17; T-285-CONF-FRA-CT, p. 43, lines 11-15.

<sup>683</sup> T-285-CONF-FRA-CT, p. 45, lines 4-11.

<sup>684</sup> EVD-D01-00148, p. 0080, lines 258-284, and T-290-CONF-FRA-ET, p. 5, line 4, to p. 6, line 4.

witness stated that he had requested permission from commander Kisembo.<sup>685</sup>

- W-0297 stated that he had been a bodyguard for [REDACTED] and then for [REDACTED].<sup>686</sup> When he testified before the Chamber, the witness made conflicting statements about the commander to whom he reported during the battle against the French.<sup>687</sup>
- When giving evidence he claimed that his brother, who was killed in Katoto during an attack by the Lendu, was called [REDACTED].<sup>688</sup> During cross-examination, he stated that his brother was instead called [REDACTED].<sup>689</sup>

311. The mendaciousness of W-0297's statements is illustrated by the various conflicting statements of the witness on the subject of his mother's identity and her death:<sup>690</sup>

- W-0297 told W-0581 in November 2007 that his mother was called [REDACTED], and that she had died in [REDACTED].<sup>691</sup>
- When he met the Defence in December 2009, he stated that his mother, whose name was [REDACTED], was alive and living in [REDACTED]. He further stated that he did not know [REDACTED].<sup>692</sup>

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<sup>685</sup> T-291-CONF-FRA-ET, p. 11, line 3, to p. 12, line 18, and p. 13, lines 1-8. EVD-D01-00152, pp. 300-301, lines 255-315.

<sup>686</sup> T-287-CONF-FRA-CT, p. 6, lines 12-13.

<sup>687</sup> T-291-CONF-FRA-ET, p. 7, lines 7-25 (He stated that he was under [REDACTED]'s orders). T-290-CONF-FRA-ET, p. 27, line 23, to p. 30, line 6 (He stated that he was under [REDACTED]'s orders at his meeting with W-0321, prior to the arrival of the French).

<sup>688</sup> T-286-CONF-FRA-ET, p. 8, lines 8-11.

<sup>689</sup> T-290-CONF-FRA-ET, p. 12, lines 5-15 and EVD-OTP-00563, para. 14.

<sup>690</sup> Contradictions which came to light during cross-examination by the Defence.

<sup>691</sup> EVD-D01-00296 (November 2007: see the metadata); W-0581 confirmed that he had written down in the document the information as provided by the witness. T-302-CONF-FRA-ET, p. 4, line 13, to p. 5, line 2.

<sup>692</sup> EVD-D01-00150, pp. 0064-0065, lines 412-445.

- Finally, when he gave evidence, he stated that his mother was called [REDACTED], that she was dead,<sup>693</sup> and that his aunt, [REDACTED], had married his father.<sup>694</sup>
- W-0297 stated when giving evidence that his neighbours had told him in [REDACTED] about the death of his mother after the battle.<sup>695</sup> Yet, during his December 2007 interview with the investigators, he claimed to have found his mother's body at his neighbours' house in [REDACTED].<sup>696</sup>

312. Witness [REDACTED] confirmed that W-0321 had asked W-0297 to lie about his mother's death.<sup>697</sup>

313. Witness [REDACTED] stated that the biological mother of W-0297 is still alive and that she is called [REDACTED].<sup>698</sup> This was confirmed by [REDACTED].<sup>699</sup> He stated that the person in question is alive and living in [REDACTED].<sup>700</sup>

314. Evidently, the witness was attempting to reconcile two conflicting versions of his mother's identity.

315. Finally, the testimony of W-0297 includes numerous implausibilities which make his account completely unrealistic. For example:

- W-0297 claimed that in November 2002 or thereabouts,<sup>701</sup> Chief of Staff Kitembo enlisted children in a school in [REDACTED] in person and that he himself was in charge of these recruits.<sup>702</sup> However, it is unlikely that the Chief of Staff carried out these tasks, and in particular trained the

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<sup>693</sup> T-290-CONF-FRA-ET, p. 18, line 3.

<sup>694</sup> T-290-CONF-FRA-ET, p. 17, lines 3-5.

<sup>695</sup> T-290-CONF-FRA-ET, p. 22, lines 11-21.

<sup>696</sup> T-290-CONF-FRA-ET, p. 22, lines 11-21, and p. 23, lines 2-3, and EVD-OTP-00563, para. 20.

<sup>697</sup> [REDACTED]: [REDACTED].

<sup>698</sup> [REDACTED].

<sup>699</sup> [REDACTED]. He recognised [REDACTED], the biological mother of W-0297, in photograph EVD-D01-00151.

<sup>700</sup> [REDACTED].

<sup>701</sup> T-285-CONF-FRA-CT, p. 45, line 16, and p. 46, lines 23-25.

<sup>702</sup> T-285-CONF-FRA-CT, p. 44, lines 6-11, and T-286-CONF-FRA-ET, p. 4, line 13.

recruits, as this was not the responsibility of one of the most senior FPLC leaders.

- W-0297 claimed to have been enlisted for the first time by Kisembo,<sup>703</sup> and for the second time by Kisembo and Bosco.<sup>704</sup>
- The witness claimed that although he allegedly killed a UPC/RP soldier,<sup>705</sup> Bosco sent him to Barrière, where he underwent training and was given a firearm,<sup>706</sup> before being appointed bodyguard to Chief of Staff Kisembo.<sup>707</sup>

*- Contradictions between the statements of Witnesses W-0297 and W-0321*

316. The conflicting statements by W-0297 and W-0321 regarding various aspects of their testimony highlight their collusion to conceal the truth, specifically as follows:

- The statements of W-0297 and W-0321 regarding the first time they met are inconsistent: whereas Witness W-0321 stated that he met W-0297 for the first time at the CTO for [REDACTED] or [REDACTED],<sup>708</sup> W-0297 stated for his part that he had met W-0321 several times over a very short space of time (more than 8 meetings),<sup>709</sup> before he was demobilized for good.<sup>710</sup>

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<sup>703</sup> T-286-CONF-FRA-ET, p. 4, line 13.

<sup>704</sup> T-286-CONF-FRA-ET, p. 11, lines 14-20.

<sup>705</sup> T-286-CONF-FRA-ET, p. 14, line 24, to p. 15 line 2.

<sup>706</sup> T-286-CONF-FRA-ET, p. 19, lines 12-22, and p. 20, lines 2-6.

<sup>707</sup> T-286-CONF-FRA-ET, p. 21, lines 4-8.

<sup>708</sup> T-322-CONF-FRA-ET, p. 27, lines 12-16.

<sup>709</sup> T-287-CONF-FRA-CT, p. 22, lines 8-9.

<sup>710</sup> T-287-CONF-FRA-CT, p. 2, line 18, to p. 13, line 16. W-0297 claimed to have met W-0321 in 2002, when he was still in the UPC, in [REDACTED] (T-287-CONF-FRA-CT, p. 2, lines 18-24, and p. 4, lines 22-24); he claimed that W-0321 was [REDACTED] for [REDACTED] (*idem*, p. 3, lines 1-7). W-0297 stated that he saw W-0321 again several times when he was in the army (*ibidem*, p. 5, lines 6-24, and p. 11, lines 11-16). At these meetings, W-0321 allegedly attempted to persuade him to leave the army (*ibidem*, p. 9, lines 19-21, and p. 13, lines 2-11).

- W-0297 claimed to have met W-0321 between 2002 and before the French arrived in Bunia, when W-0321 was working for [REDACTED].<sup>711</sup> Yet, W-0321 stated that at that time he was in the 5<sup>th</sup> year of secondary school at the [REDACTED] and took his state examination in [REDACTED].<sup>712</sup>
- W-0297 stated that 5 youths (including himself) were waiting for the interview with W-0581<sup>713</sup> together, which W-0321 denied.<sup>714</sup>
- As far as the circumstances of being allegedly reunited by W-0321 are concerned, it is important to note that the testimonies of W-0297 and W-0321 are completely different.<sup>715</sup>

### 2.7.3 The credibility of Witness W-0297

317. The Prosecutor submits that W-0297 gave evidence “without embellishment or ulterior motive”.<sup>716</sup> In doing so, the Prosecutor ignores the fact that at the end of his testimony, W-0297 stated that a person acting on behalf of the Prosecutor had told him that a sum of money to pay a bride price would be paid to him in exchange for his testimony.<sup>717</sup> The request was sent to the Office of the Prosecutor on 22 April 2009, and was repeated on 24 May 2010 once he had finished giving evidence.<sup>718</sup> Although the person acting on behalf of the Prosecutor denied promising the witness any sum of money,<sup>719</sup> the witness for his part assumed that he would receive the promised sum.<sup>720</sup>

<sup>711</sup> T-287-CONF-FRA-CT, p. 2 lines 18-19, and T-290-CONF-FRA-ET, p. 28, lines 2-4 (on the period).

<sup>712</sup> T-308-CONF-FRA-ET, p. 7, lines 10-15.

<sup>713</sup> T-287-CONF-FRA-CT, p. 32, lines 18-20, and p. 33, lines 1-3. “[TRANSLATION] [REDACTED] were there.” *Idem*, p. 33, lines 20-21.

<sup>714</sup> T-308-CONF-FRA-ET, p. 66, line 4, to p. 68, line 1.

<sup>715</sup> W-0297 explained that W-0321 came to his parents’ home after he had deserted, to persuade him to go to the CTO: T-287-CONF-FRA-CT, p. 13, line 19, to p. 14, line 9. Contradicting W-0297, W-0321 stated that he himself had reunited W-0297 with his parents: T-309-CONF-FRA-ET, p. 29, lines 1-5.

<sup>716</sup> ICC-01/04-01/06-2748-Conf, para. 449.

<sup>717</sup> Prosecution e-mails entitled “[REDACTED]”, dated 24 and 25 May 2010.

<sup>718</sup> The Defence notes that this information was not provided to it prior to the testimony of Witness W-0297, even though it had been in the Prosecution’s possession since April 2009.

<sup>719</sup> Prosecution e-mail entitled “[REDACTED]” and dated 25 May 2010.

<sup>720</sup> Prosecution e-mail entitled “[REDACTED]” and dated 24 May 2010.

318. Furthermore, the witness called on the Office of the Prosecutor for assistance on at least one other occasion, in September 2009.<sup>721</sup>
319. Moreover, Witness W-0297 has been afforded protective measures since 2008, and has been relocated as a result. Under these arrangements, he is fully provided for, firstly by the Prosecutor, and then by the Court's protection programme.
320. Consequently the Prosecutor's claim that Witness W-0297 gave evidence without ulterior motive is unfounded.
321. In addition, W-0297 sought to meet the three Defence witnesses called to give evidence about him before the Chamber prior to their testimony:
- W-0297 repeatedly approached Witnesses [REDACTED] and [REDACTED]<sup>722</sup> with a view to meeting them when they travelled through Kinshasa, prior to their giving evidence before the Court,<sup>723</sup> in order to obtain information about the content of their testimony.<sup>724</sup>
  - Witnesses D01-0004 and D01-0003 then informed him of the content of their statements before the Chamber.<sup>725</sup>
  - In December 2010, W-0297 contacted [REDACTED] by telephone to ask him to state untruthfully that he had been a soldier, otherwise "[TRANSLATION] he would be sent to jail". He implored [REDACTED] to meet him before giving evidence before the Court.<sup>726</sup>
322. This information suggests that the witness was seeking to conceal the mendaciousness of his testimony.

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<sup>721</sup> "[REDACTED]" Prosecution e-mail entitled "[REDACTED]" and dated 25 May 2010.

<sup>722</sup> [REDACTED] initially refused to contact W-0297: T-291-CONF-FRA-ET, p. 41, lines 21-25.

<sup>723</sup> T-291-CONF-FRA-ET, p. 41, line 10, to p. 42, line 11, p. 43, lines 3-5 and 12-13.

<sup>724</sup> T-285-CONF-FRA-CT, p. 30, lines 3-17.

<sup>725</sup> T-285-CONF-FRA-CT, p. 30, line 19.

<sup>726</sup> [REDACTED]: [REDACTED].

#### 2.7.4 The pressure exerted by “Cordo”

323. The manifest mendaciousness of the statements of W-0297 precludes the attachment of any credibility whatsoever to his statements alleging that the person known as “Cordo” exerted pressure on Witnesses [REDACTED] and [REDACTED].
324. Witnesses [REDACTED] and [REDACTED] themselves stated that they had not been encouraged to testify in the Accused’s favour, or to distort the truth, in any way.<sup>727</sup> Rather, they stated that they felt the general disapproval of local people for having made mendacious statements against Thomas Lubanga<sup>728</sup> in return for money. The witnesses emphasised that no pressure was brought to bear on them to testify before the Chamber.<sup>729</sup>
325. Although the Prosecutor had been informed several months previously of the identity and contact details of the person known as “Cordo”,<sup>730</sup> he did not meet him as part of his investigations. Contrary to his legal obligations,<sup>731</sup> the Prosecutor chose to rely on unverified information provided by W-0297, which was contradicted by the evidence registered in the record of the case.<sup>732</sup>

#### 2.7.5 Witness D01-0036 (Chief Mateso Lona)

326. Mateso Lona is the Chief of Lopidi I avenue, in the Simbiliabo neighbourhood in Bunia.<sup>733</sup> In this capacity, he is responsible for the security of the persons

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<sup>727</sup> [REDACTED]: [REDACTED].

<sup>728</sup> [REDACTED]: [REDACTED]. [REDACTED] explained that he was accused of “[TRANSLATION] selling another person’s child”; he falsely presented himself as [REDACTED] of W-0297 and “[TRANSLATION] betrayed Thomas to sell him down the river”: [REDACTED]. [REDACTED]: [REDACTED].

<sup>729</sup> [REDACTED]: [REDACTED].

<sup>730</sup> W-0297 revealed several clues during his testimony which could lead to the identification of the person known as “Cordo”. In addition, D01-0036 provided the investigators from the Office of the Prosecutor with “Cordo’s” identity on 22 September 2010.

<sup>731</sup> Articles 54(1)(a) and 67(2).

<sup>732</sup> See, for example, D01-0036, [REDACTED] and [REDACTED].

<sup>733</sup> T-350-CONF-FRA-CT3, p. 34, lines 18-28. The witness has lived there since 1996. *Idem*, p. 41, lines 11-16.

and property in his avenue.<sup>734</sup> The evidence of this witness corroborates the testimony of Witnesses D01-0003 and D01-0004 regarding fraudulent activities by Intermediary W-0321.<sup>735</sup>

327. His evidence proved in particular that (1) Witnesses [REDACTED], [REDACTED], [REDACTED], D01-0003 and D01-0004 were all living in Simbiliabo in 2002-2003 and 2007<sup>736</sup> and (2) Witnesses [REDACTED] and [REDACTED] were never soldiers.<sup>737</sup>

328. D01-0036 was subjected to pressure because of his testimony before the Court:

- Witness [REDACTED] tried to encourage him to claim that he was a soldier in order to conceal his own lies before the Chamber.<sup>738</sup>
- Witness D01-0036 was suspended from his duties by the Congolese administrative authorities in order to prevent him from giving evidence.<sup>739</sup>

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<sup>734</sup> T-350-CONF-FRA-CT3, p. 34, line 26, and p. 35, lines 16-17.

<sup>735</sup> A person known as [REDACTED] came to Simbiliabo with a view to recording children's details to offer them assistance: T-350-CONF-FRA-CT3, p. 45, line 15, to p. 46, line 12, and p. 49, lines 9-11. In exchange for the assistance, the children had to state falsely that they had been child soldiers: T-350-CONF-FRA-CT3, p. 50, lines 11-15. Regarding the suspicious methods of W-0321: After verification it turned out that the person did not work for the NGO [REDACTED], contrary to what he had claimed: T-350-CONF-FRA CT3, p. 49, line 22, to p. 50, line 6, and p. 47, lines 12-16.

<sup>736</sup> See, in particular, EVD-D01-01099 and his detailed explanations: T-350-CONF-FRA-CT3, p. 55, line 12, to p. 57, line 6. See also *idem*, p. 37, line 6, to p. 38, line 19 (in connection with W-0213); *ibidem*, p. 40, line 24, to p. 41, line 28 (in connection with [REDACTED]) and *ibidem*, p. 39, lines 21-28 (D01-0004). The errors noted by the Prosecutor are "typos" due to the fact that the document was a "draft" and do not affect the information contained in the document in any way: T-351-CONF-FRA-CT, p. 31, line 9, to p. 34, line 26. In any case, the names of the [REDACTED] and [REDACTED] of Witnesses [REDACTED] and [REDACTED] respectively were included in the document, thus proving that they were residents in the [REDACTED] neighbourhood [REDACTED] in 2007, as was the grandfather of D01-0004.

<sup>737</sup> See his testimony about [REDACTED]: T-350-CONF-FRA-CT3, p. 38, lines 21-28; [REDACTED]: *idem*, p. 42, lines 11-15.

<sup>738</sup> T-350-CONF-FRA-CT3, p. 42, lines 21-28, and p. 43, lines 1-6. In December 2010, [REDACTED] contacted D01-0036 by telephone and told him: "[TRANSLATION] Please, chief, if you come to the Netherlands, because I have been told that you are going to the Netherlands, do not say that I was not a soldier. You have to say that I was a soldier. Because if I say the opposite to what he said, he will be jailed." He also said: "[TRANSLATION] Before going to say anything at all, when I come to that country, we will have to get together, to meet, him and me, beforehand."

<sup>739</sup> T-351-CONF-FRA-CT, p. 3, line 17, to p. 4, line 20.

- *The impartiality of the Prosecutor's investigations*

329. The Prosecutor used the services of the Congolese authorities in his investigations: the witness was summoned to a meeting with the Office of the Prosecutor of the ICC by an official summons from the Prosecutor in the Bunia Public Prosecutor's Office.<sup>740</sup>

- *The person known as "Cordo"*

330. Contrary to what the Prosecutor intimates, Witness D01-0036 did not corroborate the testimony of Witness [REDACTED] in any way. He explained that the person known as "Cordo" did not work with young people in Simbiliabo.<sup>741</sup> He never participated in a soldier demobilization programme, but he organised a seminar for people who had been demobilized (not "young people who had been demobilized") to raise their awareness of the proper conduct to adopt with the local people.<sup>742</sup> He also stated that the Simbiliabo stadium was used for football only and that no administrative or political meetings were held there.<sup>743</sup>

331. Contrary to what the Prosecutor claims, witness D01-0036 never stated that the person known as "Cordo" "gathered all the young people who had been demobilized".<sup>744</sup> The French transcript of the hearing reads: "*il a rassemblé tous les démobilisés*" ["[TRANSLATION] he gathered all those who had been demobilized"] [emphasis added].<sup>745</sup> He added that this seminar was for demobilized soldiers from all the armed groups and that it was not aimed at young people aged 12 to 16 years.<sup>746</sup>

<sup>740</sup> EVD-D01-01100; T-350-CONF-FRA-CT3, p. 57, line 24, to p. 58, line 22.

<sup>741</sup> T-351-CONF-FRA-CT, p. 8, lines 25-28.

<sup>742</sup> T-351-CONF-FRA-CT, p. 10, lines 6-17.

<sup>743</sup> T-351-CONF-FRA-CT, p. 7, lines 10-16.

<sup>744</sup> ICC-01/04-01/06-2748-Conf, para. 457.

<sup>745</sup> T-351-CONF-FRA-CT, p. 10, line 9 [emphasis added].

<sup>746</sup> T-351-CONF-FRA-CT, p. 10, lines 18-24.

- *His credibility*

332. The witness was clearly truthful and honest. He cooperated fully with the Office of the Prosecutor in its investigations and even invited the Prosecution investigators to see his avenue,<sup>747</sup> since “[TRANSLATION] to conduct investigations it is necessary to go out into the field and to experience the reality of what happens on the ground – where events are taking place”.<sup>748</sup> In addition, he answered all the questions put to him honestly and to the best of his knowledge.<sup>749</sup>

**2.8 DRC-OTP-WWWW-0298 ([REDACTED])**

333. On 28 January 2009, during his first appearance before the Chamber, after being given the chance to consult his counsel,<sup>750</sup> W-0298 stated unprompted that he had been encouraged to lie and that he had been drilled in mendacious statements for three and a half years.<sup>751</sup> W-0298 then stated that he had never been to a training camp, thus contradicting the statement he provided to the investigators.<sup>752</sup> W-0298 went on to explain clearly that he had been approached by an NGO after studying [REDACTED], at the point where he had resumed the 1<sup>st</sup> C.O. [*cycle d’orientation*] The NGO allegedly contacted the children by telephone and reportedly promised them “[TRANSLATION] clothes and many other things”.<sup>753</sup>

<sup>747</sup> T-350-CONF-FRA-CT3, p. 58, lines 11-22.

<sup>748</sup> T-351-CONF-FRA-CT, p. 3, lines 9-10.

<sup>749</sup> Far from showing that he “could not answer questions when taken outside his script”, the witness’s answer to which the Prosecution refers in paragraph 475 shows the witness answering the questions put to him carefully and honestly, within the limits of his knowledge.

<sup>750</sup> After the confidential consultation, just before the witness was due to testify, Mr Walleyne informed the Chamber “[TRANSLATION] I can confirm that the witness is ready to give evidence. It took a while but this was precisely because I wanted to ensure that the integrity of the evidence to be presented would be safeguarded.” T-110-CONF-FRA-CT, p. 38, lines 11-13.

<sup>751</sup> T-110-CONF-FRA-CT, p. 39, line 18, to p. 40, line 11, and p. 41, lines 1-5.

<sup>752</sup> T-110-CONF-FRA-CT, p. 40, lines 8-11.

<sup>753</sup> T-110-CONF-FRA-CT, p. 39, line 24, to p. 40, line 2.

334. W-0298 emphasised several times the oath he had taken before the judges,<sup>754</sup> explaining that he wanted to tell “[TRANSLATION] my truth the way I want to tell it”.<sup>755</sup> His testimony was subsequently interrupted at the request of the Prosecutor.<sup>756</sup>
335. When he resumed giving evidence two weeks later, the witness retracted his statements and claimed to have been forcibly recruited twice by soldiers from the UPC and to have taken part in some of the fighting.<sup>757</sup>
336. However, the evidence collected against W-0321 since then, the manifestly mendacious nature of the final statements of W-0298,<sup>758</sup> and the contradictions noted between the testimony of W-0298 and W-0299 all confer a high degree of credibility on his initial statement before the Chamber.
337. The mendaciousness of subsequent statements by W-0298 is evidenced by (1) the significant contradictions and implausibilities present in his testimony; (2) the obvious contradictions between the testimony of W-0298 and the statements of his father, Witness W-0299; (3) the testimony of [REDACTED] (D01-0014) and [REDACTED] (D01-0015); and (4) the documentary evidence admitted into the record of the case.

*- The age of the witness*

338. When he gave evidence before the Chamber, W-0298 initially claimed not to remember his date of birth,<sup>759</sup> then he said that he was born in 1991.<sup>760</sup>

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<sup>754</sup> T-110-CONF-FRA-CT, p. 36, lines 1-2, and p. 39, lines 20-21.

<sup>755</sup> T-110-CONF-FRA-CT, p. 39, lines 18-21, and p. 40, lines 5-7.

<sup>756</sup> T-110-CONF-FRA-CT, p. 42, lines 17-20. Contrary to what the Legal Representatives of Witness W-0298 intimated,<sup>756</sup> when he said at his first hearing “[TRANSLATION] I will tell the chief”, he was undoubtedly addressing the Presiding Judge rather than Mr Thomas Lubanga. ICC-01/04-01/06-2746-Conf-tENG, paras. 52-53.

<sup>757</sup> T-123-CONF-FRA-CT, p. 4, line 18, to p. 5, line 4, and p. 18, line 12, to p. 19, line 23.

<sup>758</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 116-121.

<sup>759</sup> T-110-CONF-FRA-CT, p. 31, line 18.

<sup>760</sup> T-123-CONF-FRA-CT, p. 52, line 10.

339. The documentary evidence admitted into the record contradicts the claims of W-0298 regarding his year of birth:

- EVD-D01-00199: Hand-written proxy from the witness in which he declares that he was born on [REDACTED] 1989. The witness claimed that he never signed this document,<sup>761</sup> a claim contradicted by a representative of the Registry and by Intermediary W-0321.<sup>762</sup>
- EVD-D01-00042, EVD-D01-00043, EVD-D01-00155 and EVD-D01-00156: School records relating to W-0298 which state that he was born on [REDACTED] or [REDACTED] 1989.<sup>763</sup>

340. Whilst the information in these documents was also corroborated by his father's statements,<sup>764</sup> no document corroborates the statements of W-0298 regarding his age.

*- The identity of his parents, his place of birth and the death of his biological mother*

341. The testimony of W-0299 and W-0298 shows that they deliberately lied to the Office of the Prosecutor with a view to preventing any verification regarding them and in particular regarding (1) the death of [REDACTED], the biological mother of W-0298; (2) the existence of [REDACTED]; and (3) the identity of W-0299 and [REDACTED].

342. These lies explain the obvious reluctance of Witnesses W-0299 and W-0298 to answer questions put by the Defence about [REDACTED]<sup>765</sup> and [REDACTED].<sup>766</sup>

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<sup>761</sup> T-123-CONF-FRA-CT, p. 56, lines 9-11.

<sup>762</sup> ICC-01/04-01/06-01/04-01/06-2251-Conf-Anx1 and T-320-CONF-FRA-ET, p. 41, lines 1-9.

<sup>763</sup> EVD-D01-00042 ([REDACTED] 1989), EVD-D01-00043 ([REDACTED] 1989), EVD-D01-00155, p. [REDACTED] ([REDACTED] 1989). EVD-D01-00156, p. [REDACTED] ([REDACTED] 1989).

<sup>764</sup> EVD-D01-00768, p. 0270, line 849.

<sup>765</sup> W-0298: T-124-CONF-FRA-CT, p. 19, line 16, to p. 20, line 17; W-0299: T-119-CONF-FRA CT, p. 34, line 25, to p. 35, line 9.

<sup>766</sup> W-0298: T-124-CONF-FRA-CT, p. 41, lines 20 *et seq.*; W-0299: T-119-CONF-FRA-CT, p. 23, lines 19-22.

Witness W-0299 even avoided answering some of the questions.<sup>767</sup> For example, when he was asked about the current place of residence [REDACTED], the witness did not answer the question and at no point did he state that she was not dead.<sup>768</sup> He later confirmed, in response to a question from the Presiding Judge, that she is alive.<sup>769</sup> As far as W-0298 is concerned, the Defence was prevented from pursuing its line of questioning on the subject of his biological mother.<sup>770</sup>

343. In the end, the following facts were established:

- W-0299 was married to [REDACTED], with whom he had 3 children,<sup>771</sup> including W-0298.<sup>772</sup> [REDACTED] stated that his name was [REDACTED] and he bore the surname of his grandfather, [REDACTED].<sup>773</sup>
- [REDACTED] is called [REDACTED].<sup>774</sup>
- W-0299 bears the names [REDACTED] and [REDACTED];<sup>775</sup> he also bears the name [REDACTED], albeit only since 2006.<sup>776</sup>
- W-0298 lived with [REDACTED] until the age of two years,<sup>777</sup> then with [REDACTED], his father's new wife,<sup>778</sup> whose name is [REDACTED].<sup>779</sup>

<sup>767</sup> For example, T-119-CONF-FRA-CT, p. 30, line 23, to p. 31, line 1; p. 35, lines 1-3; and p. 35, line 15, to p. 37, line 13.

<sup>768</sup> T-119-CONF-FRA-CT, p. 24, line 22, to p. 25, line 14.

<sup>769</sup> T-119-CONF-FRA-CT, p. 26, line 24, to p. 27, line 7.

<sup>770</sup> T-124-CONF-FRA-CT, p. 45, lines 3-12.

<sup>771</sup> T-273-CONF-FRA-CT, p. 8, lines 12-16, and line 25, to p. 9, line 1.

<sup>772</sup> D01-0014 recognized in photograph EVD-OTP-00377 Witness W-0298 [REDACTED]: T-273-CONF-FRA-CT, p. 10, lines 5-20. D01-0015 also recognized W-0298 in the same photograph: T-278-CONF-FRA-CT, p. 13, lines 9-10.

<sup>773</sup> [REDACTED]. This information was corroborated by W-0299: T-117-CONF-FRA-CT, p. 4, lines 15-16.

<sup>774</sup> [REDACTED]. Confirmed by D01-0015: T-278-CONF-FRA-CT, p. 12, lines 18-23. W-0299 confirmed that the mother of W-0298 is called [REDACTED]: T-119-CONF-FRA-CT, p. 23, lines 19-22, and p. 24, lines 19-21.

<sup>775</sup> D01-0014: T-273-CONF-FRA-CT, p. 8, line 24, to p. 9, line 4. D01-0015: the name is written "[REDACTED] [phon.]" in transcript T-278-CONF-FRA-CT, p. 11, line 11.

<sup>776</sup> D01-0014 explained, "[TRANSLATION] He registered himself [REDACTED], when he arrived around here" (T-273-CONF-FRA-CT, p. 9, lines 7-10). Confirmed by W-0299: T-119-CONF-FRA-CT, p. 20, lines 20-23, and p. 21, lines 17-19.

- W-0298 lived with [REDACTED] for 13 years between the ages of two and 15 years;<sup>780</sup> [REDACTED];<sup>781</sup> for his part, W-0298 confirmed that he lived with [REDACTED] at the very time when he was allegedly enlisted into the army.<sup>782</sup>
- D01-0014, [REDACTED], was in touch with him during and after the war,<sup>783</sup> contrary to his claim.<sup>784</sup> W-0298 informed her that he was working “[TRANSLATION] with the white men”<sup>785</sup> and that he was given blankets, saucepans and also a large number of accessories.<sup>786</sup>

344. All this information came to light for the first time during the Defence cross-examination and during the testimony of Witnesses D01-0014 and D01-0015.

345. In any case, it is implausible that W-0299, who had been aware since 2008 that his son’s biological mother was not dead, did not inform his son of that fact.<sup>787</sup>

*- His school attendance*

346. The documents tendered into evidence as part of the testimony of Witness D01-0029 contradict a number of facts provided by Witness W-0298<sup>788</sup> on the subject of his school attendance.

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<sup>777</sup> T-273-CONF-FRA-CT, p. 11, lines 2-4.

<sup>778</sup> T-273-CONF-FRA-CT, p. 11, line 22, to p. 12, line 9, and p. 12, line 22, to p. 13, line 1. Confirmed by W-0299: T-119-CONF-FRA-CT, p. 35, lines 5-9. EVD-D01-00767, p. 0237, lines 640-648 (1992 to 2005).

<sup>779</sup> D01-0015: T-278-CONF-FRA-CT, p. 9, line 4. D01-0014: T-273-CONF-FRA-CT, p. 12, line 25, to p. 13, line 1 (“[REDACTED]”).

<sup>780</sup> D01-0015: T-278-CONF-FRA-CT, p. 12, lines 7-8, and p. 13, lines 12-18. Confirmed by W-0299: EVD-D01-00771, p. 0337, lines 82-88.

<sup>781</sup> [REDACTED].

<sup>782</sup> T-124-CONF-FRA-CT, p. 20, lines 4-8, and p. 21, lines 11-18.

<sup>783</sup> T-273-CONF-FRA-CT, p. 12, lines 4-9; p. 13, lines 8-11, and p. 20, lines 7-8.

<sup>784</sup> [REDACTED].

<sup>785</sup> T-273-CONF-FRA-CT, p. 13, lines 16-20.

<sup>786</sup> T-273-CONF-FRA-CT, p. 14, lines 6-13.

<sup>787</sup> T-119-CONF-FRA-CT, p. 27, lines 2-7, and p. 28, lines 19-24; T-122-CONF-FRA-CT, p. 17, line 9, to p. 18, line 3.

<sup>788</sup> EVD-D01-00038; EVD-D01-00042; EVD-D01-00043; EVD-D01-00049; EVD-D01-00155, p. [REDACTED]; EVD-D01-00156, p. [REDACTED]; EVD-D01-00159, p. [REDACTED]; EVD-D01-00160, p. [REDACTED]; EVD-D01-00161, p. [REDACTED]; EVD-D01-00162, p. [REDACTED]; EVD-D01-00163, p. [REDACTED].

347. In particular, these documents confirm that:

- W-0298 completed his 5<sup>th</sup> year of primary school in 2002.<sup>789</sup> It is therefore impossible for him to have been abducted before Christmas 2002 when he was in his 5<sup>th</sup> year of primary school.<sup>790</sup>
- There was no teacher called [REDACTED] at [REDACTED] in 2001-2002,<sup>791</sup> contrary to what the witness claimed.<sup>792</sup>
- W-0298 obtained his first school leaving certificate in 2004 at [REDACTED],<sup>793</sup> contrary to what he told the Chamber.<sup>794</sup>

348. The content of the documents is corroborated by the following information:

- D01-0015 confirmed that he completed his 1<sup>st</sup> year of primary school at [REDACTED] primary school and his 2<sup>nd</sup> to 6<sup>th</sup> years of schooling at the [REDACTED].<sup>795</sup>
- W-0299 confirmed that he enrolled his son in the 6<sup>th</sup> year of primary school in 2003-2004 at the [REDACTED] school.<sup>796</sup>
- W-0298 contradicted himself by saying that he did not complete his primary education at the [REDACTED] school, but rather at the [REDACTED] school,<sup>797</sup> contrary to what he told the Office of the Prosecutor in January 2008.<sup>798</sup>

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<sup>789</sup> EVD-D01-00049 and EVD-D01-00162, p. [REDACTED].

<sup>790</sup> T-123-CONF-FRA-CT, p. 48, lines 2-16.

<sup>791</sup> EVD-D01-00157.

<sup>792</sup> T-123-CONF-FRA-CT, p. 51, lines 1-4.

<sup>793</sup> EVD-D01-00042; EVD-D01-00043 and EVD-D01-00155, p. [REDACTED].

<sup>794</sup> T-124-CONF-FRA-CT, p. 9, line 21, to p. 10, line 2.

<sup>795</sup> T-278-CONF-FRA-CT, p. 14, line 19, to p. 15, line 5.

<sup>796</sup> T-120-CONF-FRA-CT, p. 24, lines 2-4.

<sup>797</sup> T-124-CONF-FRA-CT, p. 13, line 23, to p. 14, line 1. This statement is corroborated by school record EVD-D01-00155.

<sup>798</sup> EVD-D01-00200, p. 0223, para. 103.

- W-0299 confirmed in addition that it was he who enrolled W-0298 in school and provided all the information about him and his family to [REDACTED].<sup>799</sup>

*- The significant contradictions and implausibilities in the testimony of W-0298*

349. Contrary to what his Legal Representatives claim, Witness W-0298 did not “confirm[...] the entirety of his previous statements” and did not “provide[...] a multitude of details to supplement what he had previously stated”.<sup>800</sup> His statements contain significant contradictions and implausibilities, revealed by the Defence cross-examination, including the following:

- The witness stated that he was enlisted by the UPC soldiers in 2002, before the Christmas season, for around four months.<sup>801</sup> Yet, in his application to participate as a victim, he stated that he was enlisted from February 2001 to March 2003.<sup>802</sup>
- In his testimony, W-0298 claimed that commander [REDACTED] came to Bule to transfer him to Largu,<sup>803</sup> whereas in January 2008, he had told the Office of the Prosecutor that the person in question was called [REDACTED].
- In his testimony, W-0298 claimed that he went to grind cassava at the mill so as to leave Largu camp,<sup>804</sup> whereas during his cross-examination, it emerged that he used this “trick” when he was about to flee Mabanga camp instead.<sup>805</sup>
- The witness contradicted himself about the amount of time which elapsed between his first and second enlistment: he initially stated that after his

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<sup>799</sup> T-119-CONF-FRA-CT, p. 38, lines 14-24.

<sup>800</sup> ICC-01/04-01/06-2746-Conf-tENG, para. 53.

<sup>801</sup> T-123-CONF-FRA-CT, p. 48, lines 15-16, and T-124-CONF-FRA-CT, p. 25, lines 4-7.

<sup>802</sup> ICC-01/04-01/06-2518-Conf-Anx, p. 9/30.

<sup>803</sup> T-123-CONF-FRA-CT, p. 25, lines 9-12.

<sup>804</sup> T-123-CONF-FRA-CT, p. 18, lines 2-6.

<sup>805</sup> T-124-CONF-FRA-CT, p. 37, lines 1-5.

first enlistment, he returned to school and completed his 1<sup>st</sup> year of secondary school.<sup>806</sup> Yet, under cross-examination he stated that he was not in the 1<sup>st</sup> year of secondary school.<sup>807</sup>

350. On a number of key aspects, W-0298's statements conflict with those of his father, Witness W-0299. In particular, Witness W-0299 contradicted the testimony of W-0298 regarding his alleged periods of enlistment. He stated that W-0298 left school for two months to join the UPC.<sup>808</sup> This statement contradicts W-0298 on the length of time he spent at Bule camp.<sup>809</sup>
351. Moreover, Witness D01-0015, [REDACTED], with whom he lived from 1992 to 2005,<sup>810</sup> confirmed on several occasions that W-0298 was never a member of an armed group.<sup>811</sup> Contrary to what the Prosecutor claims,<sup>812</sup> Witness D01-0015 never confirmed that she knew that W-0298 had left to join the UPC/FPLC.<sup>813</sup>
352. Rather, she stated that W-0298 ran away from school with friends and that he was working at the Bule market.<sup>814</sup> He returned from Bule after a week,<sup>815</sup> and when he returned from Bule, he was carrying a weapon which he had stolen from a soldier.<sup>816</sup> D01-0015 explained that the weapon was taken by the Chief of the locality, who returned it to the military camp.<sup>817</sup> This account was corroborated by W-0299, who said this for the first time in January 2010, after giving evidence.<sup>818</sup>

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<sup>806</sup> T-123-CONF-FRA-CT, p. 18, lines 4-7.

<sup>807</sup> T-124-CONF-FRA-CT, p. 16, lines 10-17.

<sup>808</sup> EVD-D01-00769, p. 0295, line 270.

<sup>809</sup> T-124-CONF-FRA-CT, p. 25, lines 4-7. W-0298 stated that he spent four months there.

<sup>810</sup> W-0299; EVD-D01-00768, p. 0272, lines 909-922.

<sup>811</sup> T-278-CONF-FRA-CT, p. 17, lines 10-12, and p. 18, lines 5-6, and T-279-CONF-FRA-ET, p. 18, line 2.

<sup>812</sup> ICC-01/04-01/06-2748-Conf, para. 382, footnote 1082.

<sup>813</sup> See testimony of D01-0015. At no point did she mention that W-0298 went to join the UPC.

<sup>814</sup> T-279-CONF-FRA-ET, p. 6, lines 7-15.

<sup>815</sup> T-279-CONF-FRA-ET, p. 18, lines 4-5.

<sup>816</sup> T-279-CONF-FRA-ET, p. 7, line 8.

<sup>817</sup> T-279-CONF-FRA-ET, p. 6, line 25, to p. 7, line 3.

<sup>818</sup> EVD-D01-00768, p. 0283, lines 1340-1342. See also EVD-D01-00769, pp. 0292-0293, lines 161-200.

353. W-0299 explained that the information about the enlistment of W-0298 was relayed to him by [REDACTED]; he himself did not witness the enlistment.<sup>819</sup> [REDACTED] testimony on this aspect is therefore much more reliable than that of W-0299.

*- Intermediary W-0321*

354. Contrary to what W-0321 claimed,<sup>820</sup> W-0299 and W-0298 stated that W-0298 was given assistance by [REDACTED] when he was living with his family and after hearing on the radio that NGOs were looking for children in order to demobilize them.<sup>821</sup>

355. In this regard, W-0298 stated that staff from the NGO were looking for children.<sup>822</sup> He added that he was taken right there on the street, in front of the family compound, and that he did not go to the CTO of his own accord. This was around mid-2005.<sup>823</sup> He trained as [REDACTED] for six months.<sup>824</sup>

*- W-0299's testimony regarding W-0298*

356. Contrary to what the Prosecutor asserts, the interview with the father of Witness W-0298 did not corroborate his testimony, since the essential aspects of their statements are conflicting.

357. W-0299's statements on the circumstances surrounding his son's enlistments are in themselves contradictory and inconsistent.

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<sup>819</sup> EVD-D01-00771, p. 0037, lines 104-106 and EVD-D01-00770, p. 0316, lines 114-140.

<sup>820</sup> W-0321 stated that the child was coming out of the bush, that he was dirty and unwell. He stated that he found his family for family reintegration: T-310-CONF-FRA-ET, p. 38, line 25, to p. 39, line 12 and lines 20-25.

<sup>821</sup> W-0298: T-123-CONF-FRA-CT, p. 20, lines 10-12, and p. 41, lines 8-19, and p. 42, lines 15-22. W-0299: T-122-CONF-FRA-CT, p. 19, line 21, to p. 20, line 1.

<sup>822</sup> T-122-CONF-FRA-CT, p. 19, line 21, to p. 20, line 1.

<sup>823</sup> T-122-CONF-FRA-CT, p. 20, line 15.

<sup>824</sup> T-122-CONF-FRA-CT, p. 20, line 21, to p. 21, line 5.

358. In his testimony, W-0299 stated that his son was enlisted before the 2002 Christmas season whilst he was on the road on his way home from school,<sup>825</sup> and that he went to collect him at Largu camp between February and May 2003.<sup>826</sup> He then stated that his son stayed at his house for around a year,<sup>827</sup> until the school holidays after his 6<sup>th</sup> year,<sup>828</sup> before being enlisted again for a few weeks.<sup>829</sup>

359. This version conflicts with the following material:

- His statement that W-0298 left the army before the French arrived,<sup>830</sup> in June 2003;
- He was unable to say where Largu camp was,<sup>831</sup> even though he claimed that he went there to collect his son;
- He was unable to provide the full name of the person who went to collect his son from Mabanga camp.<sup>832</sup>

360. This version also conflicts with the hand-written statement of W-0299, which is appended to his application for participation as a victim.<sup>833</sup> In it, he stated specifically that:

- W-0298 was enlisted in 2001.<sup>834</sup>
- W-0298 was at school when he was enlisted.<sup>835</sup>

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<sup>825</sup> T-117-CONF-FRA-CT, p. 8, lines 10-15.

<sup>826</sup> T-117-CONF-FRA-CT, p. 33, lines 7-9.

<sup>827</sup> T-117-CONF-FRA-CT, p. 34, line 25.

<sup>828</sup> T-117-CONF-FRA-CT, p. 35, lines 12-15.

<sup>829</sup> T-117-CONF-FRA-CT, p. 36, lines 16-18.

<sup>830</sup> T-119-CONF-FRA-CT, p. 8, lines 9-13.

<sup>831</sup> T-120-CONF-FRA-CT, p. 30, line 17, to p. 31, line 9.

<sup>832</sup> T-120-CONF-FRA-CT, p. 45, line 23, to p. 46, line 11.

<sup>833</sup> ICC-01/04-01/06-1518-Conf-Anx, pp. 15/30 *et seq.*

<sup>834</sup> Reading: T-119-CONF-FRA-CT, p. 7, lines 2-10. ICC-01/04-01/06-15-18-Conf-Anx, p. 15/30.

<sup>835</sup> Reading: T-119-CONF-FRA-CT, p. 13, lines 1-4. ICC-01/04-01/06-15-18-Conf-Anx, p. 15/30.

- W-0298 remained under the orders of commander [REDACTED] until 2004.<sup>836</sup> The witness corrected his statement by stating that the UPC was dissolved in 2003, when the French arrived.<sup>837</sup>
- At the point when W-0298 was enlisted, he was stationed in [REDACTED] and he only returned in March 2003.<sup>838</sup>

361. Moreover, the additional statements the witness provided to the Office of the Prosecutor in 2010 contradict his testimony and that of his son on several essential aspects. For example:

- Contrary to what W-0298 claimed, W-0299 stated that his son was taken to Bule camp in a lorry.<sup>839</sup>
- In explaining that W-0298 returned home with his weapon whilst [REDACTED] was there,<sup>840</sup> W-0299 contradicted both the version of the facts he provided to the Chamber<sup>841</sup> and the version provided by his son.<sup>842</sup>
- After going to collect W-0298 from Largu camp, he claimed to have settled with him in [REDACTED] in February 2002.<sup>843</sup> This assertion contradicts his testimony in its entirety, as well as that of his son regarding his son's presence in the UPC armed forces in 2002.

362. In light of the foregoing, it has been shown that Witnesses W-0298 and W-0299 made manifestly mendacious statements before the Chamber.

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<sup>836</sup> ICC-01/04-01/06-15-18-Conf-Anx, p. 16/30.

<sup>837</sup> T-119-CONF-FRA-CT, p. 15, lines 18-21.

<sup>838</sup> ICC-01/04-01/06-15-18-Conf-Anx, p. 16/30.

<sup>839</sup> EVD-D01-00194, pp. 0015 *et seq.*

<sup>840</sup> EVD-D01-00769, p. 0292, 168-172.

<sup>841</sup> W-0299 stated that he had to collect his son from [REDACTED]. T-117-CONF-FRA-CT, p. 31, line 21, to p. 32, line 1, and p. 36, lines 21-23.

<sup>842</sup> W-0298 stated that he had been given a weapon and uniform after his training, which lasted four months, and he never mentioned that he returned home alone after a week. T-124-CONF-FRA-CT, p. 24, line 19, to p. 25, line 7.

<sup>843</sup> EVD-D01-00769, pp. 0296-0298, lines 316-364.

363. The mendacious statements made by the Prosecution witnesses presented as former child soldiers contain many similarities, thereby confirming the testimonies of W-0015,<sup>844</sup> D01-0003,<sup>845</sup> D01-0004,<sup>846</sup> and D01-0016<sup>847</sup> to the effect that there was collusion with a view to providing false statements to support the charges against the Accused. Indeed, all the witnesses presented as former child soldiers supplied false information on their identities,<sup>848</sup> the identities of family members,<sup>849</sup> their school attendance,<sup>850</sup> their places<sup>851</sup> and dates of birth,<sup>852</sup> and their places of residence.<sup>853</sup>
364. In addition, many witnesses falsely stated that one of their parents was dead or had disappeared,<sup>854</sup> or that they did not know how to read.<sup>855</sup>

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<sup>844</sup> “[TRANSLATION] So it was a plan which they used. They are not... they did not... no, they did not start work when I was a witness; I believe they set up this network well before I presented myself as a witness.” T-265-CONF-Red-FRA-CT2, p. 16, lines 6-11 [emphasis added].

<sup>845</sup> For example T-241-CONF-FRA-CT, p. 3, lines 16-21.

<sup>846</sup> For example T-242-CONF-FR ET page 8, lines 18-23.

<sup>847</sup> For example T-256-CONF-FRA-CT, p. 12, lines 10-14.

<sup>848</sup> For example: See *supra*, analysis of Witnesses W-0007, W-0008, W-0011, W-0297. See also: W-0015: T-265-CONF-FRA-CT2, p. 22, lines 4-12; D01-0004: T-245-CONF-FRA-CT, page 15, lines 10-13.

<sup>849</sup> For example: See *supra*, analysis of Witnesses W-0007, W-0008, W-0011, W-213, W-0297 and W-0298. See also: W-0015: T-265-CONF-Red-FRA-CT2, p. 21, lines 21 *et seq.*

<sup>850</sup> W-0015: “[TRANSLATION] I had to name a school in Isiro, even though I never studied in Isiro. I had to provide information so that I could not be traced.” ICC-01/04-01/06-T-264-CONF-FRA CT3, p. 69, lines 17-19. See also *supra*, analyses of Witnesses W-0007, W-0008, W-0010, W-0011, W-0157, W-0213, W-0297 and W-0298.

<sup>851</sup> For example: See *supra*, analysis of Witnesses W-0007, W-0008, W-0011, W-0213 and W-0297. See also: D01-0004: T-242-CONF-FRA-ET, p. 8, lines 1-6.

<sup>852</sup> For example: See *supra*, analysis of Witnesses W-0007, W-0008, W-0010, W-0011, W-0157, W-0213, W-0297 and W-0298.

<sup>853</sup> W-0015 told the Chamber that Intermediary W-0316 was asking him to give an account which was untrue and to mention certain names or locations to ensure that he could not be traced (T-264-CONF-FRA-CT3, p. 69, lines 17-19). See also D01-0004: T-242-CONF-FRA-CT2, p. 8, lines 4-5. See also *supra*, analysis of Witnesses W-0007, W-0008 and W-0297.

<sup>854</sup> For example, Witness W-0015 falsely stated at his first meeting with the Office of the Prosecutor that both his parents were dead (T-265-CONF-Red-FRA-CT2, p. 21, line 21 to p. 22, line 12). See also D01-0016, who stated that his mother had disappeared (EVD-OTP-00533, pp. 1301-1302, pp. 1593-1604 and T-257-CONF-FRA-CT2, p. 33, lines 19-20). See also *supra*, analysis of Witnesses W-0011, W-0297 and W-0299.

<sup>855</sup> W-0015: T-265-CONF-Red-FRA-CT2, p. 25, line 20, to p. 26, line 10. See also *supra*, analysis of Witness W-0157.

### 3. SCHOOL RECORDS

365. The errors noted by the Office of the Prosecutor in the school records for the witnesses who were presented as former child soldiers do not in any way affect the reliability of the personal information recorded therein.
366. The Defence also refers the Chamber to the explanatory table of the various school documents appended to its "Defence Application Seeking a Permanent Stay of the Proceedings".<sup>856</sup>

### 4. TRAUMA

367. The examination of Witness DRC-CHM-WWWW-0001, Ms Elisabeth Schauer, demonstrated that:
- A diagnosis of PTSD (post-traumatic stress disorder) can only be made after a medical examination;<sup>857</sup> yet, it has not been proven that any one of the witnesses who appeared before the Court reportedly suffered from PTSD.
  - Trauma suffered by a person does not affect memory and will not cause the person to lose memory of an event or to forget the truth. The person will simply find it difficult to talk about the traumatic event.<sup>858</sup>
  - The occurrence of post-traumatic stress disorder has no impact whatsoever on a person's ability to remember non-violent experiences.<sup>859</sup>
368. It follows that the Prosecutor has no grounds to insist that the Chamber consider the impact of trauma on the ability of witnesses to remember the events recounted during testimony when weighing their credibility.

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<sup>856</sup> ICC-01/04-01/06-2657-Conf-Anx1-tENG.

<sup>857</sup> T-166-FRA-CT, p. 48, lines 1-7.

<sup>858</sup> T-166-FRA-CT, p. 54, lines 12-22.

<sup>859</sup> T-166-FRA-CT, p. 75, lines 10-14.

## II – OTHER WITNESSES

### 1. DRC-OTP-WWWW-0041 ([REDACTED])

#### 1.1 The establishment of the UPC and its activities until September 2002

369. The witness presented the UPC as a political party whose goal was to unite Iturians and whose members met at the home of its President, Thomas Lubanga.<sup>860</sup> At no time did he suggest that the UPC had military objectives or had an armed wing. When asked about the situation prevailing in April 2002, he mentioned the “[TRANSLATION] war between the Lendus and the Hemas”<sup>861</sup> and the conflicts between “the Ugandans” and the RCD-K/ML,<sup>862</sup> but at no time claimed that the UPC was involved in these as an armed militia.
370. On the contrary, he emphasised that the *Front pour la Réconciliation et la Paix* (FRP),<sup>863</sup> of which Thomas Lubanga and several other UPC founders are members, did not have an armed wing in August 2002.<sup>864</sup>
371. Moreover, the fact that Thomas Lubanga held high office in the FLC, and subsequently in the RCD-K/ML government until April 2002, including as Commissioner with responsibility for defence,<sup>865</sup> renders completely implausible the claim that, prior to that date, he could have established an independent armed force hostile to the government of which he was one of the most distinguished representatives.

#### 1.2 The position and activities of Thomas Lubanga from April 2002 to late August 2002

372. The witness stated that Thomas Lubanga visited Kasese, Uganda on around 18 April 2002 at the head of an FRP delegation, [REDACTED], to meet the

<sup>860</sup> T-124-CONF-FRA-CT, p. 76, lines 4-13, and p. 78, lines 4-7.

<sup>861</sup> T-124-CONF-FRA-CT, p. 78, line 21, to p. 79, line 4.

<sup>862</sup> T-125-CONF-FRA-CT, p. 84, lines 1-6.

<sup>863</sup> The FRP is presented as a “[TRANSLATION] platform for uniting all Iturians”. T-124-CONF-FRA-CT, p. 83, lines 8-11.

<sup>864</sup> T-125-CONF-FRA-CT, p. 15, lines 10-14.

<sup>865</sup> T-124-CONF-FRA-CT, p. 79, lines 5-9.

Ugandan authorities;<sup>866</sup> he further stated that, subsequent to this meeting, Thomas Lubanga only returned to Ituri on 1 May 2002.<sup>867</sup>

373. The witness confirmed that Thomas Lubanga went to Kampala in late May 2002 as a member of an FRP delegation;<sup>868</sup> that the delegation, of which the witness was a member, stayed in Kampala for about two weeks;<sup>869</sup> that at the end of these two weeks, the members of the delegation, including Thomas Lubanga, were arrested by the Ugandan authorities, forcibly transferred to Kinshasa, and incarcerated in DEMIAP, the political prison in Kinshasa, where they were held for 25 days, with Thomas Lubanga being held for several more days;<sup>870</sup> that, subsequent to this detention, during which no contact with the outside world was possible,<sup>871</sup> Thomas Lubanga was placed under house arrest at the Kinshasa Grand Hotel;<sup>872</sup> and that towards the end of August, at the initiative of the Kinshasa authorities, Thomas Lubanga, accompanied by the Minister for Human Rights, was transferred to Bunia as FRP representative.<sup>873</sup>

374. The witness's statements over this period prompt the following observations:

- At no time did the witness mention the establishment of an armed militia within the UPC and under the command of Thomas Lubanga. On the contrary, the witness emphasised that during this period, Thomas Lubanga and the members of the delegations of which he was a member pursued purely political ends within the framework of the FRP,<sup>874</sup> an organisation

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<sup>866</sup> T-124-CONF-FRA-CT, p. 81, line 22, to p. 82, line 22. See also EVD-D01-00050.

<sup>867</sup> T-124-CONF-FRA-CT, p. 83, lines 12-15, and T-125-CONF-FRA-CT, p. 89, line 24, to p. 90, line 1.

<sup>868</sup> T-126-CONF-FRA-CT, p. 6, lines 14-21.

<sup>869</sup> T-125-CONF-FRA-CT, p. 6, lines 21-23.

<sup>870</sup> T-125-CONF-FRA-CT, p. 9, line 14, to p. 12, line 2, and T-126-CONF-FRA-CT, p. 10, line 8, to p. 11, line 2. See also EVD-D01-00047.

<sup>871</sup> T-126-CONF-FRA-CT, p. 9, lines 22-25.

<sup>872</sup> T-125-CONF-FRA-CT, p. 11, line 24, to p. 12, line 2 and T-126-CONF-FRA-CT, p. 9, lines 19-24.

<sup>873</sup> T-125-CONF-FRA-CT, p. 17, line 13, to p. 18, line 7.

<sup>874</sup> T-125-CONF-FRA-CT, p. 6, lines 14-15, and p. 12, line 24, to p. 13, line 7.

with no armed forces.<sup>875</sup> He stated that, following their return from Kasese, the members of the delegation returned home to “[TRANSLATION] go about their usual business”.<sup>876</sup> He also stated that the FRP members had designated Thomas Lubanga to accompany the Minister for Human Rights to Ituri.<sup>877</sup>

- During that period, with the exception of May, Thomas Lubanga was outside Ituri, and for part of the time was in detention in Kinshasa. This means that he was unable to participate in the organisation of an armed insurrectional movement in Ituri. At no point did the witness, who was particularly close to Thomas Lubanga [REDACTED]<sup>878</sup> and who was at his side during all the political activities he undertook in that period, mention any kind of contribution by Thomas Lubanga to the organisation of such a movement.
- Contrary to the assertion in the Prosecution brief,<sup>879</sup> the witness did not claim that Thomas Lubanga appointed Richard Lonema to represent him in Bunia in his absence. On the contrary, the witness emphasised that he did not know who appointed Mr Lonema,<sup>880</sup> and merely said, wrongly, that Mr Lonema “[TRANSLATION] was representing” him in Bunia. The witness added that he did not know who the leader of the “[TRANSLATION] armed dissidents” in Bunia was in August 2002.<sup>881</sup>

### 1.3 The establishment of the FPLC

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<sup>875</sup> T-125-CONF-FRA-CT, p. 15, lines 12-14.

<sup>876</sup> T-125-CONF-FRA-CT, p. 5, lines 7-9.

<sup>877</sup> T-125-CONF-FRA-CT, p. 18, lines 4-7.

<sup>878</sup> T-124-CONF-FRA-CT, p. 71, lines 8-11.

<sup>879</sup> ICC-01/04-01/06-2748-Conf, para. 102.

<sup>880</sup> T-125-CONF-FRA-CT, p. 27, lines 11-12.

<sup>881</sup> T-125-CONF-FRA-CT, p. 25, lines 20-24.

375. The witness confirmed that there was no “[TRANSLATION] regular systematic recruitment” from 2 September 2002.<sup>882</sup> He said “[TRANSLATION]...it is really difficult for me to say when the UPC recruited since most of the UPC soldiers I came across in the field when I returned from Kinshasa had already been trained or were being trained”.<sup>883</sup> He thus established that most of the “FPLC” soldiers had already been enlisted between his departure from Bunia in May 2002 and his return in late August 2002, and that he had not observed any significant recruitment thereafter.
376. The witness said that he did not know which leader of the dissident soldiers took control of Bunia with the support of the Ugandan army.<sup>884</sup> At no point did he claim that Thomas Lubanga was in contact with them during that period.
377. The witness claimed that some of these dissidents were Thomas Lubanga’s “guards”;<sup>885</sup> he also claimed that Kisembo and Bosco Ntaganda acted as bodyguards for Thomas Lubanga.<sup>886</sup> Such allegations are manifestly in error: these two persons performed high command functions within the APC and were at no time assigned as mere bodyguards of Thomas Lubanga, either before or after their defection from the APC.<sup>887</sup> In this respect, the witness acknowledged that, in fact, he did not know exactly what functions Kisembo performed and that he only described him as Thomas Lubanga’s bodyguard because he had seen him in Thomas Lubanga’s entourage.<sup>888</sup>

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<sup>882</sup> T-125-CONF-FRA-CT, p. 68, lines 18-24.

<sup>883</sup> T-125-CONF-FRA-CT, p. 70, lines 19-24.

<sup>884</sup> T-125-CONF-FRA-CT, p. 26, lines 20-24.

<sup>885</sup> T-125-CONF-FRA-CT, p. 15, lines 15-17.

<sup>886</sup> T-125-CONF-FRA-CT, p. 3, line 22, to p. 4, line 3.

<sup>887</sup> D01-0019: T-340-FRA-CT, p. 42, line 14, to p. 43, line 1.

<sup>888</sup> T-126-CONF-FRA-CT, p. 5, lines 6-20.

#### 1.4 The FRP's political statement of 11 August 2002 (EVD-OTP-00386)

378. The witness stated that the objective of that statement was to allow the FRP to make political capital out of the new situation which emerged after the dissident APC soldiers took control of Bunia.<sup>889</sup> He emphasised that at that time, the FRP did not have an armed wing and that the document was intended to be "somewhat dissuasive"<sup>890</sup> in nature.
379. He thereby confirmed that the announcement in that document that "[TRANSLATION] our dissident armed soldiers of the RCD/ML, united behind the former Minister of Defence of the RCD/ML, Mr Thomas LUBANGA, have taken effective control of Bunia and its surroundings [...]" does not reflect the actual political and military situation, but must be viewed as an attempt by the FRP members to make political capital out of a military success to which they had not contributed.
380. This analysis is confirmed by the testimony of Witness D01-0019.<sup>891</sup> It is also corroborated by the fact that no document prior to 11 August 2002 issued by the FRP or UPC, or bearing the signatures of UPC members, mentions the existence of an armed force at the disposal of either of those organisations or claiming to be under Thomas Lubanga. Conversely, as from September 2002, the UPC/RP reiterated in documents and public statements its military involvement in the fighting that took place on 9 August 2002. This assertion is historically false, but was politically expedient for the purposes of establishing the legitimacy of its authority at the regional level and its national aspirations within the context of the establishment of transitional institutions.

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<sup>889</sup> T-126-CONF-FRA-CT, p. 16, lines 1-11.

<sup>890</sup> T-125-CONF-FRA-CT, p. 15, lines 6-7.

<sup>891</sup> T-344-CONF-FRA-ET, p. 27, lines 4-22.

381. Far from referring to an armed wing of the UPC, the witness stated that, in his understanding, the Ugandan army had supported the RCD-ML dissidents in order to “[TRANSLATION] drive Molondo Lompondo out of Bunia”.<sup>892</sup>

### **1.5 FPLC enlistment procedures**

382. The witness acknowledged that he only obtained information on this matter through hearsay, without specifying the origin of such information.<sup>893</sup> His testimony on this matter therefore lacks sufficient reliability to be accepted.

383. Moreover, he mentioned that some of his “[TRANSLATION] fellow teachers” were proud “[TRANSLATION] to have children in the ranks of the fighting soldiers”;<sup>894</sup> no details were provided regarding the supposed age of these children.

384. He stressed that there was no systematic recruitment as from 2 September 2002.<sup>895</sup>

### **1.6 The presence of children under the age of 15 years in the FPLC**

385. The witness claimed that there were “child soldiers” in the UPC.

386. However, the only details he offered pertain to the bodyguards who were allegedly provided to him or to Thomas Lubanga, Kisembo, Bosco Ntaganda and other commanders. At no time did he claim to have been able to assess the age of soldiers assigned to fighting units.

387. He was unsure about the age of his own bodyguard, which he estimates at 14 or 15;<sup>896</sup> he stated that the bodyguard had not been “[TRANSLATION] equipped with weapons as such”, but subsequently got hold of a weapon.<sup>897</sup> He stated

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<sup>892</sup> T-125-CONF-FRA-CT, p. 16, lines 9-15.

<sup>893</sup> T-125-CONF-FRA-CT, p. 67, lines 15-16.

<sup>894</sup> T-125-CONF-FRA-CT, p. 71, lines 9-12.

<sup>895</sup> T-125-CONF-FRA-CT, p. 68, lines 18-24.

<sup>896</sup> T-125-CONF-FRA-CT, p. 59, lines 8-10.

<sup>897</sup> T-125-CONF-FRA-CT, p. 52, lines 18-22, and T-126-CONF-FRA-CT, p. 56, lines 18-21.

that this child was placed in his service with the agreement of the child's family and that all he did was to carry the magazine of the weapon and accompany the witness on some of his movements, and that he enjoyed a great deal of freedom.<sup>898</sup>

388. Regarding the 12 young bodyguards who were said to have been posted at his residence for a week by a commander,<sup>899</sup> he alleged that they were aged between 14 and 16 years.<sup>900</sup> However, he underscored the difficulty of distinguishing by sight between those who were aged more than 15 years and those who were aged 14 years, emphasising the influence of diet on their physique.<sup>901</sup> At no time did he say that he had specific information on their ages.
389. He emphasised that the fact that he had an armed bodyguard aged 14 or 15 years never appeared to him to be a crime.<sup>902</sup>
390. Regarding the bodyguards of Bosco Ntaganda and Kisembo, the witness merely made a general remark on the age group of the bodyguards, which he estimated at between 13 and 22 years, without providing any specific and concrete information as to how he estimated these ages.<sup>903</sup> Contrary to the assertion in the Prosecution brief, the witness did not say that "all UPC/FPLC military commanders had bodyguards under the age of 15, as did officials from the national secretaries to the President",<sup>904</sup> but merely claimed that "[TRANSLATION] they were young people" whom he estimated were in the 13-22 years age group.<sup>905</sup>

<sup>898</sup> T-126-CONF-FRA-CT, p. 57, line 9, to p. 58, line 13.

<sup>899</sup> T-126-CONF-FRA-CT, p. 49, lines 7-10.

<sup>900</sup> T-126-CONF-FRA-CT, p. 54, line 22, to p. 55, line 2. The witness also suggested an age group of 13-14 years for the youngest: T-125-CONF-FRA-CT, p. 53, lines 21-23.

<sup>901</sup> T-126-CONF-FRA-CT, p. 55, lines 9-20.

<sup>902</sup> T-126-CONF-FRA-CT, p. 56, line 24, to p. 57, line 3.

<sup>903</sup> T-125-CONF-FRA-CT, p. 66, lines 12-17.

<sup>904</sup> ICC-01/04-01/06-2748-Conf, para. 221 [emphasis added].

<sup>905</sup> T-125-CONF-FRA-CT, p. 57, line 18, to p. 58, line 7.

391. Regarding Thomas Lubanga's bodyguards, the witness claimed that "[TRANSLATION] there were adults but also young people like my guard".<sup>906</sup> However, he offered no other specific and concrete information as to how he could have estimated their age. At no time did he claim that there were children under the age of 15 years amongst these guards.
392. In general, he claimed that the use of young people as bodyguards was because those in authority who had guards were personally responsible for their food, medical and equipment costs, and even the costs of their family members, particularly their children;<sup>907</sup> young people without dependants were therefore less costly. This explanation precludes the extrapolation of the observations regarding the commanders' bodyguards to the fighting units.

### **1.7 Demobilization measures**

393. The witness confirmed that the decree of 1 June 2003 gave rise to a meeting of the UPC executive in the President's office; he emphasised that the reading out of the Decree by the President himself was the "[TRANSLATION] high point of the meeting".<sup>908</sup>
394. He stated that this issue was discussed from the second meeting of the UPC executive, since the first meeting was only an initial contact meeting following the return of the UPC to Bunia in May 2003.<sup>909</sup> He thus highlighted the priority Thomas Lubanga attached to the issue of demobilizing minors.
395. He confirmed the effective enforcement of that Decree: "[TRANSLATION] we demobilized the child soldiers".<sup>910</sup> At no time did the witness claim that this decree was not enforced and that its issuance was only a stratagem aimed at

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<sup>906</sup> T-125-CONF-FRA-CT, p. 59, lines 3-5.

<sup>907</sup> T-125-CONF-FRA-CT, p. 59, lines 16-24, and T-126-CONF-FRA-CT, p. 51, lines 16-19, and p. 52, lines 13-18.

<sup>908</sup> T-125-CONF-FRA-CT, p. 45, lines 1-20, and p. 46, lines 11-14.

<sup>909</sup> T-125-CONF-FRA-CT, p. 45, lines 1-8.

<sup>910</sup> T-125-CONF-FRA-CT, p. 45, line 24, to p. 46, line 3. See also EVD-OTP-00728.

deceiving the international community. He confirmed that this decree had been read and “disseminated” at a certain “level” and did not dispute the authenticity of its implementing orders.<sup>911</sup>

### **1.8 The existence of an international conflict**

396. The witness mentioned the delivery of arms from Rwanda.<sup>912</sup>
397. The witness confirmed the direct involvement of Mr Mbusa Nyamyisi in the conflict in Ituri.<sup>913</sup>
398. The witness confirmed the decision of the United Nations to maintain the presence of Ugandan troops in the Congo.<sup>914</sup>

### **1.9 Community connections of the UPC sponsors and UPC/RP National Secretaries**

399. By specifying the community connections of the main UPC sponsors and National Secretaries of the UPC/RP from September 2002, the witness highlighted the fact that, contrary to the Prosecution’s argument, the movement led by Thomas Lubanga brought together individuals from a very wide variety of community and regional backgrounds (only 6 out of 24 National Secretaries were Hema).<sup>915</sup>
400. The clarifications provided by the witness also confirm that senior positions were assigned to people of Lendu or Ngiti<sup>916</sup> origin, as well as to other non-Hema personalities, thereby testifying to the effectiveness of the pacification and reconciliation policy initiated by Thomas Lubanga.

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<sup>911</sup> T-126-CONF-FRA-CT, p. 39, lines 4-11. See also EVD-OTP-00691.

<sup>912</sup> T-125-CONF-FRA-CT, p. 74, lines 9-19.

<sup>913</sup> T-125-CONF-FRA-CT, p. 86, lines 12-14.

<sup>914</sup> T-126-CONF-FRA-CT, p. 8, lines 1-24.

<sup>915</sup> T-126-CONF-FRA-CT, p. 25, line 4, to p. 27, line 4; p. 28, line 8, to p. 30, line 22; and p. 31, line 8, to p. 32, line 10. See also EVD-D01-00050 and EVD-OTP-00721.

<sup>916</sup> For example, Akobi (Ngiti), coordinator of the executive from October 2002 to March 2003: T-126-CONF-FRA-CT, p. 37, line 20 to p. 38, line 2.

### 1.10 Other matters

401. The witness confirmed that the “UPC/RP” was established in September 2002.<sup>917</sup>
402. The witness confirmed that Radio Candip, a private radio station belonging to the Bunia Pedagogical Institute (ISP), was used by the UPC/RP to broadcast official messages.<sup>918</sup>
403. The witness confirmed that after meetings of the UPC/RP executive, meeting reports were broadcast on Radio Candip. However, the witness, who was not National Secretary from 2 September 2002 to 6 March 2003, did not participate in the meetings during that period.<sup>919</sup>
404. The witness confirmed that the UPC/RP executive was unable to meet between 6 March and 10 May 2003.<sup>920</sup>

## 2. DRC-OTP-WWWW-0016 (JOHN HOYETI)

### 2.1 The witness’s credibility

405. The witness is the “[REDACTED]” and stated that he has been supervising [REDACTED] since March 2008. His responsibilities in the field of [REDACTED] provide reasonable grounds for assuming that the witness has especially close ties of allegiance to the current Congolese government. In view of such ties, this testimony should be considered with particular caution.
406. For example, the witness’s peremptory and inaccurate assertion that there were no child soldiers in the national armed forces of the DRC clearly stemmed from his wish to support the Congolese authorities.<sup>921</sup>

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<sup>917</sup> T-125-CONF-FRA-CT, p. 20, lines 10-13.

<sup>918</sup> T-125-CONF-FRA-CT, p. 25, lines 2-11.

<sup>919</sup> T-125-CONF-FRA-CT, p. 43, line 15, to p. 44, line 13.

<sup>920</sup> T-126-CONF-FRA-CT, p. 33, lines 19-23.

<sup>921</sup> T-191-CONF-FRA-CT, p. 16, line 19, to p. 17, line 1.

407. It may thus be legitimately feared that he was using his witness status to serve the interests of those authorities, of whom Thomas Lubanga is a well-known opponent, to the detriment of the Accused.

## 2.2 Formation of the UPC armed forces

408. The witness mentioned having been appointed [REDACTED] 14 days after his arrest in Bunia by Ugandan soldiers, an arrest which allegedly occurred the day after the fighting which led to Governor Lomondo's flight from Bunia.<sup>922</sup> It may be inferred from this that the witness was appointed to the [REDACTED] post around 24 August 2002, that is, prior to Mr Thomas Lubanga's return to Bunia.

409. The witness stated that he was appointed to this position by Floribert Kisembo,<sup>923</sup> 48 hours after leaving [REDACTED] camp, where he claimed he had spent 10 days,<sup>924</sup> and described Bosco Ntaganda as being in charge of the camp.<sup>925</sup>

410. He mentioned that, in his opinion, two or three batches of recruits had been trained prior to his arrival at [REDACTED] camp<sup>926</sup> (where he was transferred shortly after 9 August 2002), necessarily in June and July 2002 and early August 2002.

411. These clarifications establish that:

- In the absence of Mr Thomas Lubanga, who only returned to Bunia on 29 August 2002,<sup>927</sup> Floribert Kisembo, leader of the rebellion, made appointments in the armed forces which he commanded. At no time

<sup>922</sup> T-190-CONF-FRA-CT, p. 58, lines 1-15.

<sup>923</sup> T-189-CONF-FRA-CT, p. 60, lines 9-19.

<sup>924</sup> T-189-CONF-FRA-CT, p. 12, line 25, to p. 13, line 2, and p. 59, lines 5-12.

<sup>925</sup> T-189-CONF-FRA-CT, p. 16, lines 17-21.

<sup>926</sup> T-189-CONF-FRA-CT, p. 24, lines 12-13, and T-190-CONF-FRA-CT, p. 58, lines 16-25.

<sup>927</sup> D01-0019 mentioned that he only saw Mr Thomas Lubanga again at the end of August 2002: T-340-FRA-CT, p. 41, line 22. W-0041 mentioned that they returned from Kinshasa at the end of August: T-125-CONF-FRA-CT, p. 12, line 10.

did the witness mention Mr Thomas Lubanga's intervention in the [REDACTED] appointment process.

- With the exception of the dissident APC soldiers, recruited and trained under the APC, the soldiers of the armed force led by Kisémbó, Bosco Ntaganda, Kahwa and some dissident APC commanders were recruited and trained in Mandro camp as from June 2002 and before Mr Thomas Lubanga's return to Bunia, that is, during a period when Mr Thomas Lubanga was not in Ituri.

412. The testimony therefore confirmed, firstly, that the armed soldiers who took power in Bunia in August 2002 with the support of the Ugandan forces were not under the command of Mr Thomas Lubanga, but of Floribert Kisémbó and other rebel leaders, and secondly, that Mr Thomas Lubanga, absent from Ituri, played no role in the recruitment of armed soldiers acting under their orders.

### **2.3 The presence of children under the age of 15 years in the FPLC**

#### *- At Mandro camp*

413. The witness claimed to have stayed 10 days at the [REDACTED] training camp in August 2002, before his appointment to the [REDACTED] position, that is, during a period when Mr Thomas Lubanga was absent from Ituri.

414. He alleged the presence of minors aged between 13 and 17 years and, in particular, the presence of a young boy aged 13 years, called [REDACTED].<sup>928</sup>

415. This allegation invites the following observations:

- The witness based his assessment of the ages of these children on general impressions generated by their behaviour; at no time did he provide accurate information on their real age; the same applies, in particular, to the individuals named as [REDACTED] and [REDACTED].

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<sup>928</sup> T-189-CONF-FRA-CT, p. 15, lines 4-13.

Extremely confused in his statements, the witness was unable to estimate the proportion of children under the age of 15 years among the minors present in the camp.<sup>929</sup>

- The witness mentioned that during his brief stay in the camp, he did not share the same premises as the young recruits and occupied the area set aside for instructors;<sup>930</sup> that he did not engage in any communal activities with the recruits during the day<sup>931</sup> and that he did not take his meals with them;<sup>932</sup> he also said there was some kind of hostility on the part of the “[TRANSLATION] small ones” towards him.<sup>933</sup> These circumstances, which demonstrate the witness’s lack of proximity to, and familiarity with, the young recruits, cast serious doubt on his ability to assess their ages and to distinguish between recruits over the age of 15 years and those aged 14 or 13 years;
- Contrary to the Prosecutor’s claim,<sup>934</sup> the witness did not estimate at “approximately 50%” the number of children under the age of 15 years in the 13/17 age bracket, but at “[TRANSLATION] less than 50%”,<sup>935</sup> which in fact reflects the witness’s inability to assess the ages of the recruits and to speak with certainty to the presence of children under the age of 15 years.

*- In the Presidential Guard*

416. The witness claimed that, of the 60 guards in this unit, about ten were aged less than 17 years<sup>936</sup> and, “[TRANSLATION] not four” under the age of 15

<sup>929</sup> T-189-CONF-FRA-CT, p. 23, line 12, to p. 24, line 18.

<sup>930</sup> T-190-CONF-FRA-CT, p. 66, line 19, to p. 67, line 1.

<sup>931</sup> T-190-CONF-FRA-CT, p. 67, lines 7-9.

<sup>932</sup> T-190-CONF-FRA-CT, p. 68, lines 16-23.

<sup>933</sup> T-190-CONF-FRA-CT, p. 69, lines 1-7 and line 22, to p. 70, line 5.

<sup>934</sup> ICC-01/04-01/06-2748-Conf, para. 156.

<sup>935</sup> T-189-CONF-FRA-CT, p. 24, lines 15-17.

<sup>936</sup> T-189-CONF-FRA-CT, p. 30, lines 2-11.

years.<sup>937</sup> He stated that the youngest might have been 14 years old.<sup>938</sup> On this point, the Prosecutor misrepresents the evidence by claiming that the witness had alleged that four children were between 13 and 14 years old:<sup>939</sup> the witness clearly stated that fewer than (“[TRANSLATION] not four”) four children might have been under 15 years old and that the youngest might have been 14 years old.

417. The witness offered no explanation as to how he was able to assess the ages of these guards so accurately. And yet, it is impossible from a visual assessment alone to make a sufficiently accurate distinction between a child of 15 years and one of 14 years.
418. Furthermore, this assertion is contradicted by Witnesses D01-0011<sup>940</sup> and D01-0019,<sup>941</sup> who confirmed that no minor was assigned to Thomas Lubanga’s guard.

## 2.4 Recruitment into the FPLC

### *- Absence of compulsory enlistment*

419. The witness confirmed his previous statements that “[TRANSLATION] recruitment was voluntary, since the children, lacking other choices, reported for it. There was no conscription of children”;<sup>942</sup> he stated that many recruits came of their own volition to avenge their families, and underscored the fact that “[TRANSLATION] they were keener on volunteering than keenness itself”.<sup>943</sup>

<sup>937</sup> T-189-CONF-FRA-CT, p. 35, lines 10-11.

<sup>938</sup> T-189-CONF-FRA-CT, p. 30, line 25.

<sup>939</sup> ICC-01/04-01/06-2748-Conf, para. 298.

<sup>940</sup> T-347-CONF-FRA-ET, p. 24, line 26, to p. 25, line 2; p. 25, lines 6-10; and p. 59, lines 7-17.

<sup>941</sup> T-340-FRA-CT, p. 37, lines 19-25, p. 38, lines 19-22, and p. 39, lines 16-21; and T-341-FRA-ET, p. 12, lines 2-4.

<sup>942</sup> T-190-CONF-FRA-CT, p. 64, lines 14-16.

<sup>943</sup> T-189-CONF-FRA-CT, p. 78, line 25, to p. 79, line 4.

420. He confirmed that he never saw “[TRANSLATION] recruits coming from afar, that we went, for example, in a vehicle to get them, as is done in the army”.<sup>944</sup>

*- Absence of a planned recruitment policy*

421. Insisting on the voluntary nature of the enlistments, the witness pointed out that “[TRANSLATION] there weren’t people actually looking for recruits”.<sup>945</sup>

422. He said that he never saw the G5 carrying out recruitments and stated that the role of the G5 (Eric Mbabazi) was to give “[TRANSLATION] morale-boosting lessons” to the soldiers<sup>946</sup> and to “[TRANSLATION] encourage the local people to improve their behaviour”.<sup>947</sup>

423. At no time did the witness mention any measures taken by the UPC/RP authorities aimed at carrying out military recruitments or, in general, the existence of a military recruitment policy.

### **2.5 Autonomy of the military command structure**

424. The witness confirmed that Mr Thomas Lubanga did not play any role in the planning and execution of military operations, with the exception of budgetary aspects and “[TRANSLATION] only remained in his residence to await the report”.<sup>948</sup>

### **2.6 Other matters**

425. The witness stated that Mandro training camp was located several kilometres from Mandro village and was inaccessible to vehicles.<sup>949</sup>

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<sup>944</sup> T-189-CONF-FRA-CT, p. 79, lines 12-14.

<sup>945</sup> T-189-CONF-FRA-CT, p. 79, line 2.

<sup>946</sup> T-189-CONF-FRA-CT, p. 75, lines 4-12.

<sup>947</sup> T-189-CONF-FRA-CT, p. 77, lines 2-6.

<sup>948</sup> T-190-CONF-FRA-CT, p. 9, lines 12-17.

<sup>949</sup> T-191-CONF-FRA-CT, p. 35, lines 10-25.

### 3. DRC-OTP-WWWW-0017 ([REDACTED])

#### 3.1 The witness's credibility

426. The Defence emphasises that W-0015 testified that he had acted as an intermediary between W-0017 and the Office of the Prosecutor.<sup>950</sup> The Office of the Prosecutor did not, however, state its position on the identity of the intermediary who is alleged to have introduced W-0017 to it.<sup>951</sup> The Defence has requested the Prosecutor to clarify this situation and to disclose to it the exact identity of the intermediary; there has been no response to this request.<sup>952</sup>
427. Furthermore, the Defence was denied the opportunity to verify all this information when cross-examining W-0017, since it did not have all the relevant information at the time of the witness's appearance.
428. The Defence submits that the Prosecutor's silence on the exact circumstances in which W-0017 was introduced to it and W-0015's participation in a concerted operation aimed at presenting false testimony before the Chamber should be taken into consideration in assessing the credibility of W-0017.

#### 3.2 His military career

429. The witness stated that he began his military career in the DRC in 1999.<sup>953</sup> He allegedly joined the UPC in 2002 on a date which he is unable to specify.<sup>954</sup> He was then allegedly sent to Rwanda to study the operation of heavy weapons.<sup>955</sup> He allegedly left the UPC around August 2002.<sup>956</sup>

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<sup>950</sup> T-265-CONF-Red-FRA-CT2, p. 38, lines 3-15.

<sup>951</sup> See EVD-D01-01037, p. 5787, last line (table provided to the Defence on 22 June 2010) and EVD-D01-01039, p. 5852, #15, line 1 (table provided to the Defence on 24 November 2010).

<sup>952</sup> See, in particular, T-299-CONF-FRA-ET, p. 29, line 20, to p. 33, line 9.

<sup>953</sup> T-154-CONF-FRA-CT, p. 13, line 21, to p. 14, line 1.

<sup>954</sup> T-154-CONF-FRA-CT, p. 17, lines 1-4.

<sup>955</sup> T-154-CONF-FRA-CT, p. 19, lines 16-18.

<sup>956</sup> T-154-CONF-FRA-CT, p. 16, lines 7-12.

### 3.3 Self-defence committees

430. W-0017 saw the self-defence committees for the first time when he was in Fataki.<sup>957</sup> The witness stated that the self-defence system was organised because, when villages were attacked, people were taken by surprise.<sup>958</sup> The witness allegedly belonged to the [REDACTED] self-defence committee,<sup>959</sup> which was mainly composed of armed civilians.<sup>960</sup> He allegedly left the committee to join the UPC ranks.<sup>961</sup>

### 3.4 Thomas Lubanga's relationship with the army

431. The witness observed that "[TRANSLATION] Kisémbó's influence was greater, especially in the army, than that of President Thomas".<sup>962</sup> Kisémbó played a key military role in the UPC.<sup>963</sup>

432. W-0017 mentioned that he never "[TRANSLATION] heard or witnessed the issuing of orders by President Thomas Lubanga".<sup>964</sup> He never saw "[TRANSLATION] the influence of President Lubanga exceed that of Kisémbó".<sup>965</sup>

433. W-0017 allegedly heard the FPLC Chief of Staff say that with the President, "[TRANSLATION] it's always about politics. This time, if it has to be done, we're going to carry out the pacification by force of arms".<sup>966</sup>

434. W-0017 stated that he never "[TRANSLATION] saw or heard the President issue decisions or say anything about the army", since the orders came from Chief of Staff Kisémbó.<sup>967</sup>

<sup>957</sup> T-160-CONF-FRA-CT, p. 38, line 14.

<sup>958</sup> T-160-CONF-FRA-CT, p. 38, lines 14-15.

<sup>959</sup> T-160-CONF-FRA-CT, p. 32, lines 22-23, and p. 39, lines 3-5.

<sup>960</sup> T-160-CONF-FRA-CT, p. 39, lines 6-10.

<sup>961</sup> T-154-CONF-FRA-CT, p. 16, lines 7-12.

<sup>962</sup> T-160-CONF-FRA-CT, p. 42, lines 1-4.

<sup>963</sup> T-160-CONF-FRA-CT, p. 42, lines 11-13.

<sup>964</sup> T-160-CONF-FRA-CT, p. 44, lines 1-2.

<sup>965</sup> T-160-CONF-FRA-CT, p. 44, lines 2-3.

<sup>966</sup> T-160-CONF-FRA-CT, p. 44, lines 5-6.

435. W-0017 stated that those who were in the army felt that the Supreme Commander was Kisémbó.<sup>968</sup> “[TRANSLATION] He was really influential”.<sup>969</sup> W-0017 did not hear Thomas’s name at Mandro camp,<sup>970</sup> where the witness went once. W-0017 stated that “[TRANSLATION] all the talk there was of Kahwa”.<sup>971</sup> The witness always considered that Kahwa started the UPC’s armed wing.<sup>972</sup>
436. W-0017 stated that, in his opinion, Thomas Lubanga’s actions were mainly at the political level,<sup>973</sup> that he was an “[TRANSLATION] ideological leader”.<sup>974</sup> According to W-0017, “[TRANSLATION] Thomas was actually a political figure and the army was something of a side issue”.<sup>975</sup>
437. W-0017 pointed out that his commander rarely spoke to him about Thomas Lubanga. To the best of his knowledge, Thomas Lubanga never went to Mongbwalu.<sup>976</sup> He never personally saw Thomas Lubanga with Bosco Ntaganda.<sup>977</sup>
438. W-0017 added that it was rare, surprising and unusual to see the President in military uniform.<sup>978</sup>
439. W-0017 stated that he heard about Thomas Lubanga for the first time when Thomas Lubanga arrived at Bunia airport<sup>979</sup> following his return from Kinshasa.

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<sup>967</sup> T-160-CONF-FRA-CT, p. 44, lines 7-9.

<sup>968</sup> T-160-CONF-FRA-CT, p. 45, lines 7-9.

<sup>969</sup> T-160-CONF-FRA-CT, p. 45, line 9.

<sup>970</sup> T-160-CONF-FRA-CT, p. 45, line 12.

<sup>971</sup> T-160-CONF-FRA-CT, p. 45, line 13.

<sup>972</sup> T-160-CONF-FRA-CT, p. 45, lines 14-15.

<sup>973</sup> T-160-CONF-FRA-CT, p. 46, lines 9-12.

<sup>974</sup> T-160-CONF-FRA-CT, p. 46, lines 2-7.

<sup>975</sup> T-160-CONF-FRA-CT, p. 44, line 17, to p. 45, line 2.

<sup>976</sup> T-160-CONF-FRA-CT, p. 47, lines 15-19.

<sup>977</sup> T-160-CONF-FRA-CT, p. 47, line 24, to p. 48, line 2.

<sup>978</sup> T-160-CONF-FRA-CT, p. 48, lines 18-24.

<sup>979</sup> T-160-CONF-FRA-CT, p. 49, lines 4-10.

### 3.5 The international character of the conflict

440. The witness was allegedly selected to go and study heavy weapons in Rwanda with 47 other soldiers.<sup>980</sup> This training was allegedly provided by Rwandan officers.<sup>981</sup> W-0017 said that he observed the presence of an officer in charge of liaison between the UPC and Rwanda in the person of commander Safari.<sup>982</sup> To W-0017's understanding, weapons were delivered from Rwanda.<sup>983</sup> The witness mentioned the presence of the Ugandan army as an occupying force.<sup>984</sup>

### 3.6 The presence of child soldiers

441. On several occasions during his testimony, W-0017 mentioned that he noted the presence of child soldiers in the UPC ranks. However, the witness only communicated his personal assessment of the ages of these children<sup>985</sup> without having verified its accuracy.<sup>986</sup>

### 3.7 The *kadogo* unit in Mamedì

442. The witness stated that the Chief of Staff gathered young people in a special unit in Mamedì.<sup>987</sup> W-0017 maintained that the aim in gathering them was to protect them because they were vulnerable, and that times were very hard, especially as a result of the weather conditions and the lack of accommodation and food.<sup>988</sup>

<sup>980</sup> T-154-CONF-FRA-CT, p. 38, line 22, and p. 58, line 25, to p. 59, line 3.

<sup>981</sup> T-154-CONF-FRA-CT, p. 60, line 25, to p. 61, line 5.

<sup>982</sup> T-154-CONF-FRA-CT, p. 59, lines 4-11.

<sup>983</sup> T-158-CONF-FRA-CT, p. 32, lines 1-13.

<sup>984</sup> T-154-CONF-FRA-CT, p. 66, lines 7-9 and lines 18-20, and p. 16, lines 5-9, and T-158-CONF-FRA-CT, p. 13, lines 3-10 and lines 17-19.

<sup>985</sup> T-160-CONF-FRA-CT, p. 57, lines 11-13: "[TRANSLATION] Q: Are these ages [...] the result of your personal assessment. A: Yes"; T-158-CONF-FRA-CT, p. 17, lines 16-17: "[TRANSLATION] I can't give you the exact age, but I can estimate that they were in any event under the age of 15 years" [emphasis added]; T-154-CONF-FRA-CT, p. 40, lines 10-20, and p. 80, lines 19-20.

<sup>986</sup> T-160-CONF-FRA-CT, p. 57, line 16: "[TRANSLATION] Let's say, it never occurred to me to ask their ages out of curiosity".

<sup>987</sup> T-158-CONF-FRA-CT, p. 21, lines 3-5.

<sup>988</sup> T-158-CONF-FRA-CT, p. 20, line 15, to p. 21, line 7.

443. According to the witness, these young people did not have military duties.<sup>989</sup> He did not see them patrolling or going to fetch water. They did not help with the construction of the airport landing strip.<sup>990</sup> They sang songs to forget their suffering.<sup>991</sup>
444. The witness did not provide any details of the ages of the children in this unit. He estimated that the youngest, whose identity was not provided, “[TRANSLATION] could have been about 12 years old”,<sup>992</sup> but no verification was made to determine the child’s exact age.

### 3.8 Demobilization measures

445. The witness stated that one morning, the Chief of Staff requested the commander of the unit of *kadogos* to have them demobilized.<sup>993</sup>
446. The young people who were allegedly opposed to this demobilization allegedly remained in the military compound but without weapons and military uniforms.<sup>994</sup>
447. The witness stated that the NGO Caritas took care of the child soldiers.<sup>995</sup> He also mentioned the difficulties encountered with these demobilizations and in particular, “[TRANSLATION] because there was a time when anyone could be armed in Bunia”.<sup>996</sup>
448. The witness maintained that some child soldiers were re-recruited by the Chief of Staff following the arrival of the Artemis force,<sup>997</sup> but he stated that, at that time, Thomas Lubanga had left Bunia for Kinshasa and Kisembo was

<sup>989</sup> T-158-CONF-FRA-CT, p. 22, lines 14-17.

<sup>990</sup> T-158-CONF-FRA-CT, p. 22, lines 20-23.

<sup>991</sup> T-158-CONF-FRA-CT, p. 23, line 23, to p. 24, line 5.

<sup>992</sup> T-158-CONF-FRA-CT, p. 21, lines 14-18.

<sup>993</sup> T-158-CONF-FRA-CT, p. 45, lines 9-21.

<sup>994</sup> T-158-CONF-FRA-CT, p. 45, lines 9-21.

<sup>995</sup> T-158-CONF-FRA-CT, p. 61, lines 5-11.

<sup>996</sup> T-158-CONF-FRA-CT, p. 61, line 25, to p. 62, line 1 [emphasis added].

<sup>997</sup> T-158-CONF-FRA-CT, p. 51, lines 15-24, and p. 53, lines 4-23.

trying to take control of the UPC.<sup>998</sup> Moreover, he did not provide any details of the identity or ages of the individuals who were allegedly thus recruited.

### 3.9 Forcible enlistment

449. At no point in his testimony did the witness mention forcible enlistments.

## 4. DRC-OTP-WWWW-0038 ([REDACTED])

### 4.1 The witness's credibility

450. The Prosecutor states that W-0316 introduced W-0038 to the Office of the Prosecutor.<sup>999</sup> These witnesses seriously contradict each other about their different meetings and about how W-0038 was introduced to the Office of the Prosecutor.

451. Contradicting the testimony of W-0316,<sup>1000</sup> Witness W-0038 confirmed that he was identified and introduced to the Office of the Prosecutor by W-0316.<sup>1001</sup> W-0038 acknowledged that he was in contact on many occasions with W-0316 and his two colleagues, W-0183 and [REDACTED],<sup>1002</sup> [REDACTED] agents.<sup>1003</sup>

452. Witness W-0038 confirmed that, on many occasions, W-0316 was in a position to have been able to convince him to give false statements to the

<sup>998</sup> T-160-CONF-FRA-CT, p. 54, line 16, to p. 55, line 13.

<sup>999</sup> EVD-D01-01035, p. 0464, entry 27; EVD-D01-01037, p. 5791; and EVD-D01-01039, p. 5856, #29.

<sup>1000</sup> W-0316 maintained that he never introduced W-0038 to the Office of the Prosecutor and that W-0038 was already in contact with the investigators of the Office of the Prosecutor when they asked him to trace this witness: T-333-CONF-FRA-ET, p. 17, line 16, to p. 18, line 1. W-0316 maintained that all he did was to provide W-0038's telephone number to the investigators: T-333-CONF-FRA-ET, p. 17, lines 26-28, p. 18, lines 12-20, and p. 23, lines 23-28. He was also extremely evasive about his different contacts with this witness: T-333-CONF-FRA-ET, p. 24, line 1 to p. 25, line 6.

<sup>1001</sup> T-336-FRA-CONF-FRA-ET, p. 39, lines 13-27, and T-337-CONF-FRA-ET, p. 43, lines 18-22. W-0038 stated that W-0183 assisted W-0316 in his work as the Court's intermediary (T-337-CONF-FRA-ET, p. 15, lines 13-23), contradicting W-0316 on this point (T-331-CONF-FRA ET, p. 80, lines 16-19).

<sup>1002</sup> T-336-CONF-FRA-ET, p. 67, lines 19-20 and T-337-CONF-FRA-ET, p. 13, line 20, to p. 14, line 18, p. 15, lines 21-23.

<sup>1003</sup> T-337-CONF-FRA-ET, p. 13, line 20, to p. 14, line 18, p. 15, lines 21-23, and p. 15, lines 21-23 and T-336-CONF-FRA-ET, p. 67, lines 19-20.

investigators.<sup>1004</sup> Witness W-0038 confirmed that he discussed the substance of his testimony with W-0316.<sup>1005</sup> Like D01-0016, W-0038 prepared his interview with the investigators using hand-written notes.<sup>1006</sup>

453. W-0038 stated that he never rejoined an armed group after his initial contact with the investigators,<sup>1007</sup> contrary to the claims of W-0316.<sup>1008</sup>
454. Moreover, W-0038 confirmed that all the expenditure on his accommodation and food, as well as medical expenses, was fully covered by the ICC from May 2007 to February 2009. The ICC also paid W-0038's school fees for a full academic year.<sup>1009</sup>
455. The fact that W-0038 was introduced to the Office of the Prosecutor through an intermediary (W-0316) who had participated in the fabrication of mendacious statements, the major contradictions between W-0038 and W-0316 as regards their contacts, and the financial assistance provided to W-0038 for nearly two years deprive his testimony of all credibility, and shed a particular light on the aspects of W-0038's testimony discussed below.

#### **4.2 Military activities under Chief Kahwa and in the UPC armed wing as alleged by the witness**

456. The witness claimed to have been enlisted into the UPC during 2001,<sup>1010</sup> at a time when "[TRANSLATION] Chief Kahwa was known to be the UPC leader",<sup>1011</sup> to have been assigned as [REDACTED]'s bodyguard in [REDACTED] village from

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<sup>1004</sup> For example, T-336-CONF-FRA-ET, p. 44, line 24, to p. 45, line 9; p. 51, lines 8-22; p. 54, line 7, to p. 55, line 2; p. 56, line 5, to p. 57, line 5; p. 60, lines 17-25; and p. 66, line 11, to p. 68, line 20; and T-337-CONF-FRA-ET, p. 31, lines 10-27; p. 34, lines 2-26; and p. 35, lines 4-16.

<sup>1005</sup> T-336-CONF-FRA-ET, p. 42, lines 5-19, and T-337-CONF-FRA-ET, p. 8, line 9, to p. 9, line 7.

<sup>1006</sup> T-337-CONF-FRA-ET, p. 22, line 28, to p. 23, line 6, and p. 24, lines 7-18, and EVD-D01-00395.

<sup>1007</sup> T-337-CONF-FRA-ET, p. 41, lines 15-21.

<sup>1008</sup> T-333-CONF-FRA-ET, p. 17, line 16, to p. 18, line 9.

<sup>1009</sup> T-337-CONF-FRA-ET, p. 36, lines 3-28.

<sup>1010</sup> T-113-CONF-FRA-CT, p. 6, lines 5-8.

<sup>1011</sup> T-114-CONF-FRA-CT, p. 42, lines 21-24.

April 2002 to September 2002,<sup>1012</sup> and then to have continued his military activities in the FPLC until 2005.<sup>1013</sup>

457. These allegations are clearly contradicted by the school records put to the witness and tendered into the record of the case: the witness's entry in the annual results record for the 2001-2002 academic year<sup>1014</sup> shows that the witness was regularly attending school in an establishment in Bunia until July 2002 and that consequently, his allegations regarding purported military activities under [REDACTED] or in the UPC during that period are manifestly false. The witness's assertion that he left his school during the academic year is contradicted by the same document, which does not include his name under the heading "[TRANSLATION] left during the year"; the witness's confusion was also reflected in his inability to provide the exact date on which he purportedly left the school ("[TRANSLATION] I don't know whether I finished when").<sup>1015</sup>
458. Similarly, the witness admitted during cross-examination that he was enrolled in the same establishment for the 2003-2004 academic year; the statement that he was only demobilized from the UPC in 2005 is, therefore, manifestly false; to claim, as he does, that he was a student during the day and soldier at night is wholly implausible.<sup>1016</sup>
459. Furthermore, several of the witness's statements show that his claims as to his actual military activities under [REDACTED] or in the UPC in 2001-2002 are extremely doubtful:

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<sup>1012</sup> T-114-CONF-FRA-CT, p. 43, lines 15-20.

<sup>1013</sup> T-113-CONF-FRA-CT, p. 31, line 8, and T-114-CONF-FRA CT, p. 54, line 16.

<sup>1014</sup> EVD-D01-00172, p. [REDACTED]. The witness's name is not mentioned under the category "[TRANSLATION] E. left school during the academic year" (p. [REDACTED]).

<sup>1015</sup> T-114-CONF-FRA-CT, p. 48, line 22.

<sup>1016</sup> T-114-CONF-FRA-CT, p. 54, line 12, to p. 55, line 14.

- He stated that he did not take part in the fighting of August 2002 to seize control of Bunia, whereas during that period he claimed to have been [REDACTED]'s bodyguard;<sup>1017</sup> and he did not mention his participation in any military operations before the fighting in Mongwalu in November or December 2002.<sup>1018</sup>
- He described a military structure and hierarchy which only existed from September 2002<sup>1019</sup> and he claims that his activities were undertaken under the "UPC/RP", <sup>1020</sup> an abbreviation which was only introduced in September 2002;<sup>1021</sup>

460. These contradictions show that the witness's assertion that he had joined the forces of Chief Kahwa and the UPC as early as 2001 and in 2001-2002 are inaccurate and even deliberately mendacious. Their mendaciousness casts serious doubt on the credibility of all the witness's statements.

#### **4.3 Circumstances of the witness's enlistment into the UPC**

461. The witness provided contradictory versions of the circumstances of his enlistment:
462. On the one hand, he said: "[TRANSLATION] it was when our village, [REDACTED], was burned down. And when we were also driven out of Bambu, we fled to Bunia. In Bunia, the centre was under threat all the time. We were afraid. That is why I too decided to return to the UPC."<sup>1022</sup>
463. On the other hand, he claimed to have been enlisted after Chief Kahwa and Bosco Ntaganda visited his village and stated that he was taken with other

<sup>1017</sup> T-114-CONF-FRA-CT, p. 56, lines 15-25.

<sup>1018</sup> T-113-CONF-FRA-CT, p. 48, lines 15-24. (mention of battles in which he allegedly took part T-113-CONF-FRA-CT, p. 51, lines 16-22).

<sup>1019</sup> T-113-CONF-FRA-CT, p. 31, line 23, to p. 33, line 7; p. 34, lines 2-9.

<sup>1020</sup> *Ibid.* p. 31, lines 16-17.

<sup>1021</sup> For example, testimony of OTP-0041: T-125-CONF-FRA-CT, p. 20, lines 11-13.

<sup>1022</sup> T-113-CONF-FRA-CT, p. 38, lines 19-21.

children, in a lorry, to Mandro training camp.<sup>1023</sup> He added: “[TRANSLATION] I don’t know if anybody refused, but we had left, and left people behind in the village. I don’t know what happened after we left”.<sup>1024</sup> He stated that, at the time of his enlistment, he had “[TRANSLATION] gone on holiday to [REDACTED] village” and did not mention any attack during which that village was burned down.<sup>1025</sup>

464. These two versions are manifestly contradictory, both regarding the place of enlistment and its motives and modalities. The major contradictions they contain are evidence of their mendaciousness.

#### **4.4 Thomas Lubanga’s visit to Mandro camp**

465. The witness claimed to have personally been present during a visit by Thomas Lubanga to Mandro training camp, in the presence of Chief Kahwa and Chief of Staff Kisembo, during which Thomas Lubanga allegedly inspected the recruits, amongst whom were children under the age of 15 years.<sup>1026</sup>
466. Thomas Lubanga disputes the claim that he visited Mandro training camp.
467. Moreover, the witness provided contradictory versions as to the date of this visit:
468. On the one hand, he claimed that this visit took place when he was working as [REDACTED] at Mandro training camp,<sup>1027</sup> that is, as he claims, before April 2002.<sup>1028</sup>
469. On the other hand, he claimed that this visit took place following Thomas Lubanga’s return to Bunia after his detention in Kinshasa, and therefore

<sup>1023</sup> T-113-CONF-FRA-CT, p. 39, lines 4-17.

<sup>1024</sup> T-113-CONF-FRA-CT, p. 39, lines 21-24.

<sup>1025</sup> T-114-CONF-FRA-CT, p. 48, lines 7-12.

<sup>1026</sup> T-113-CONF-FRA-CT, p. 42, lines 1-18.

<sup>1027</sup> T-114-CONF-FRA-CT, p. 40, line 17, to p. 41, line 5.

<sup>1028</sup> T-114-CONF-FRA-CT, p. 44, lines 1-7.

necessarily after the end of August 2002.<sup>1029</sup> This also contradicts the witness's statement that he stayed in Rwanda from September to November 2002.<sup>1030</sup>

470. The witness therefore indicated two different periods, separated by a five-month gap and, more importantly, placed this visit sometimes before, sometimes after a major chronological milestone: the capture of Bunia in August 2002 by the dissident APC forces and Chief Kahwa.

471. Whilst it can be accepted that witnesses might be uncertain about the exact date of certain events, such a significant contradiction can only be explained by the mendaciousness of the statements themselves, whose sole objective is obviously to ascribe falsely to Thomas Lubanga the responsibility for the training of recruits under the age of 15 years.

#### **4.5 FPLC enlistment operations**

472. In light of the foregoing, the Defence contests the view that sufficient credibility can be attached to the witness's statements.

473. However, should the Chamber consider it to be sufficiently well established that the witness was a soldier in the FPLC for a certain period, then the following observations should be taken into account:

- At no time did the witness claim that Thomas Lubanga or the civilian cadres of the UPC participated in operations to enlist recruits. Contrary to the Prosecutor's assertion,<sup>1031</sup> at no time did the witness claim that Thomas Lubanga was kept informed of "recruitment campaigns". It is also inaccurate to claim that the witness alleged the participation of Chief of Staff Kisembo in recruitment campaigns.<sup>1032</sup>

<sup>1029</sup> T-114-CONF-FRA-CT, p 44, line 21, to p. 46, line 9.

<sup>1030</sup> T-114-CONF-FRA-CT, p. 6, lines 8-12, and p. 41, lines 6-16.

<sup>1031</sup> ICC-01/04-01/06-2748-Conf, para. 293.

<sup>1032</sup> ICC-01/04-01/06-2748-Conf, para. 177, footnote 347.

- Regarding Thomas Lubanga, the witness stated that whilst he was a soldier in the UPC, Thomas Lubanga remained “[TRANSLATION] in his residence in Bunia” and that he never went to Mongbwalu where the General Staff was.<sup>1033</sup> At no time did he suggest that Thomas Lubanga was involved in the preparation or execution of a military operation.
- At no time did the witness allege that there was forcible enlistment. He only described the initiatives of Chief Kahwa<sup>1034</sup> and the G5 of the FPLC General Staff to persuade the civilian population to send young people to join the FPLC,<sup>1035</sup> without suggesting any physical coercion; the Prosecutor misrepresents the witness’s testimony by claiming that he alleged that pressure was exerted on Hema families.<sup>1036</sup> Furthermore, the witness confirmed that “[TRANSLATION] yes, there were girls who volunteered”.<sup>1037</sup>
- The witness’s assessments of the ages of the young FPLC soldiers in his testimony were based solely on their physical appearance.<sup>1038</sup> He confirmed that the soldiers in the group of which he was a member, that is, the only soldiers to whom he was sufficiently close to be able to guess their age bracket, were all adults.<sup>1039</sup> Similarly, he mentioned that, at 18 years, he was the youngest of the soldiers to have been sent for training in Rwanda and was, therefore, known as a *kadogo*.<sup>1040</sup>
- The only recruitment operation the witness described was a rally at which a commander is alleged to have tried to persuade the people of Mbidjo village “[TRANSLATION] to send its children for training”.<sup>1041</sup> The rally did

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<sup>1033</sup> T-114-CONF-FRA-CT, p. 71, lines 16-18.

<sup>1034</sup> T-113-CONF-FRA-CT, p. 56, line 24, to p. 57, line 13.

<sup>1035</sup> T-114-CONF-FRA-CT, p. 27, lines 5-25.

<sup>1036</sup> ICC-01/04-01/06-2748-Conf, para. 176, footnote 345.

<sup>1037</sup> T-114-CONF-FRA-CT, p. 82, line 18.

<sup>1038</sup> See for example T-114-CONF-FRA-CT, p. 37, lines 4-7.

<sup>1039</sup> T-113-CONF-FRA-CT, p. 50, line 25, to p. 51, line 2.

<sup>1040</sup> T-114-CONF-FRA-CT, p. 7, lines 17-19.

<sup>1041</sup> T-114-CONF-FRA-CT, p. 28, line 1, to p. 29, line 8.

not lead to the recruitment of children under the age of 15 years, and the witness added: “[TRANSLATION] they were all big”.<sup>1042</sup> The witness did not explain the significance of the word “child” in this context.

- The witness confirmed that the consumption of drugs was prohibited in the FPLC, even though some soldiers used to violate this prohibition.<sup>1043</sup>

#### **4.6 The autonomy of the FPLC military high command vis-à-vis Thomas Lubanga**

474. The witness alleged that commander [REDACTED] told him that Thomas Lubanga was opposed to the offensive against the Ugandan troops which was ordered by the FPLC high command and implemented on 6 March 2003.<sup>1044</sup> This fact was confirmed by W-0012.<sup>1045</sup>
475. The above confirms that Thomas Lubanga’s decisions could be reversed by the military high command and thus he did not have effective power of control over the FPLC.

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<sup>1042</sup> T-114-CONF-FRA-CT, p. 74, line 17, to p. 75, line 1, and p. 76, line 8, to p. 77, line 5.

<sup>1043</sup> T-114-CONF-FRA-CT, p. 77, line 16, to p. 78, line 25: “[TRANSLATION] We didn’t want that”; “[TRANSLATION] It wasn’t authorized by the authorities.”

<sup>1044</sup> T-114-CONF-FRA-CT, p. 71, line 24, to p. 73, line 8.

<sup>1045</sup> T-169-CONF-FRA-CT, p. 51, lines 2-16.

## 5. DRC-OTP-WWWW-0055 ([REDACTED])

### 5.1 The witness's credibility

476. The witness mentioned having been appointed [REDACTED] in the FPLC [REDACTED] two weeks after control was taken of Mongbwalu;<sup>1046</sup> the taking of Mongbwalu might have occurred on 24 November 2002,<sup>1047</sup> and therefore the appointment of the witness to the FPLC General Staff would have taken place in early December 2002. Since the witness defected on [REDACTED] 2003,<sup>1048</sup> he would have been a member of the FPLC for barely three months.
477. The witness confirmed that he deserted from the FPLC on [REDACTED] 2003,<sup>1049</sup> after which he travelled to Uganda, where he was received immediately on [REDACTED] by President Museveni himself. He stated that he then joined the ranks of the FAPC armed group set up during the same period by commander Jérôme Kakwavu after Kakwavu himself had deserted from the FPLC.<sup>1050</sup>
478. He specified that until 2004, he acted as [REDACTED] of the FAPC, an armed movement violently hostile to the UPC/RP.<sup>1051</sup>
479. It thus appears that this witness held a high-ranking position in a political and military movement (FAPC) hostile to the Accused and backed by the Ugandan State.
480. It also appears that he had close and friendly ties with the highest Ugandan civilian and military authorities, including President Museveni himself. In the meantime, the Ugandan State was, either directly through its own armed forces, or indirectly through armed groups whose establishment it encouraged

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<sup>1046</sup> T-178-CONF-FRA-CT, p. 15, lines 9-15.

<sup>1047</sup> EVD-OTP-00710.

<sup>1048</sup> T-178-CONF-FRA-CT, p. 19, lines 1-4.

<sup>1049</sup> T-178-CONF-FRA-CT, p. 19, lines 1-4.

<sup>1050</sup> T-178-CONF-FRA-CT, p. 18, line 24, to p. 19, line 23; p. 22, line 22, to p. 23, line 1; and p. 24, lines 11-19.

<sup>1051</sup> T-178-CONF-FRA-CT, p. 34, lines 11-13, and p. 23, lines 17-18.

and whose operations it supported (FAPC, FNI, FRPI, etc.), the main military and political opponent of Thomas Lubanga.

481. In light of these observations, the witness must be considered as a person hostile to the Accused, and his testimony should be treated with the utmost caution.

## **5.2 The international character of the conflict**

482. The witness confirmed the presence of the Ugandan army in Bunia, as an occupying force, upon his arrival in Bunia.<sup>1052</sup> He confirmed that commander Jérôme Kakwavu's FAPC, established in March 2003, was backed by Uganda.<sup>1053</sup>

483. He stated that the FPLC's uniforms, weapons and ammunition came from Rwanda.<sup>1054</sup> There was someone in the Rwandan army responsible for supplying ammunition.<sup>1055</sup>

## **5.3 Autonomy of decision-making and action in the UPC's armed wing**

### *- Appointment of members of the General Staff*

484. The witness, who presented himself as an "[TRANSLATION] [REDACTED] of Bosco",<sup>1056</sup> stated that the decision to appoint him to the [REDACTED] position was taken at the initiative of Bosco Ntaganda, with Thomas Lubanga merely approving the appointment.<sup>1057</sup> He confirmed that he accompanied Bosco Ntaganda on missions to Aru territory, within the FPLC, and in particular, that he participated in the receipt of weapons, even before being introduced to Thomas Lubanga for the first time and being officially appointed to the

<sup>1052</sup> T-174-CONF-FRA-CT, p. 25, lines 11-12.

<sup>1053</sup> T-178-CONF-FRA-CT, p. 33, lines 11-14.

<sup>1054</sup> T-175-CONF-FRA-CT, p. 66, lines 1-12.

<sup>1055</sup> T-175-CONF-FRA-CT, p. 67, lines 3-7.

<sup>1056</sup> T-178-CONF-FRA-CT, p. 7, lines 1-21, and T-171-CONF-FRA-CT, p. 64, lines 13-14, and p. 65, lines 17-24.

<sup>1057</sup> T-178-CONF-FRA-CT, pp. 5-13, in particular p. 6, lines 2-11; p. 11, lines 7-13; and p. 12, line 22, to p. 13, line 5.

[REDACTED] position.<sup>1058</sup> The circumstances of his appointment to the FPLC General Staff show the broad decision-making autonomy of the military high command with respect to appointments within the FPLC. In particular, his presence in the FPLC alongside [REDACTED] and his participation in arms delivery operations unknown to Thomas Lubanga, before his official appointment, confirm that Thomas Lubanga did not exercise any *de facto* control over the initiatives of the military command structure.

*- The organisation of military structures*

485. The witness said that the establishment of military sectors, and more generally of the “[TRANSLATION] army structuring plan”, fell within the remit of the Chief of Staff and Deputy Chief of Staff, with Thomas Lubanga merely confirming the decisions taken by these military authorities.<sup>1059</sup>

*- The planning and conduct of operations falling under the powers of the military command*

486. Similarly, the witness confirmed that, regarding the planning and implementation of the FPLC operations, Thomas Lubanga only intervened to authorize the provision of logistical and financial resources.<sup>1060</sup> He stated in particular that he never saw Thomas Lubanga participate in a meeting of the General Staff.<sup>1061</sup>

*- The freedom of action of the Chief of Staff*

487. The witness stated that Kisembo went to Rwanda unknown to Thomas Lubanga.<sup>1062</sup>

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<sup>1058</sup> T-178-CONF-FRA-CT, p. 9, line 20, to p. 10, line 5; p. 11, lines 7-10; p. 11, line 16, to p. 12, line 20; and T-174-CONF-FRA-CT, p. 25, lines 16-20, and p. 26, lines 1-16.

<sup>1059</sup> T-175-CONF-FRA-CT, p. 32, lines 1-3, and p. 34, lines 13-19.

<sup>1060</sup> T-178-CONF-FRA-CT, p. 60, line 22, to p. 61, line 5.

<sup>1061</sup> T-175-CONF-FRA-CT, p. 41, lines 10-19.

<sup>1062</sup> T-175-CONF-FRA-CT, p. 24, lines 3-18.

#### 5.4 The presence of children under the age of 15 years in the FPLC

488. The witness defined *kadogo* as a term used in the army to designate children aged between 13 and 16 years.<sup>1063</sup> He mentioned the presence of *kadogos* in the troops of commander Jérôme Kakwavu in Kandoyi and amongst the FPLC recruits in Rwampara camp or as escorts.<sup>1064</sup>
489. Contrary to the Prosecutor's assertion in his brief,<sup>1065</sup> the witness did not confirm the recruitment of children under the age of 15 years. Indeed, the witness acknowledged on several occasions that he was unable to assess the ages of the young recruits,<sup>1066</sup> including that of the *kadogo* assigned to his service, who was described in a previous statement as being 16 years old.<sup>1067</sup> He specified, however, that the *kadogos* present in the FPLC "[TRANSLATION] were *kadogos* who could carry a weapon".<sup>1068</sup>

*- The young soldiers amongst commander Jérôme Kakwavu's troops*

490. The witness did not dispute having previously stated that the soldiers comprising commander Jérôme Kakwavu's troops were aged "[TRANSLATION] 15 years and above".<sup>1069</sup> During his testimony before the Chamber, he did not at any time claim that any of the *kadogos* amongst those troops were under the age of 15 years.
491. It is worth recalling that commander Jérôme Kakwavu, former APC commander, joined the UPC with his troops after August 2002<sup>1070</sup> and defected

<sup>1063</sup> T-174-CONF-FRA-CT, p. 40, lines 16-24.

<sup>1064</sup> In Kandoyi: T-174-CONF-FRA-CT, p. 39, lines 4-8; in Rwampara: T-175-CONF-FRA-CT, p.74, line 25, to p. 75, line 16; as an escort: T-176-CONF-FRA-CT, p.48, lines 7-12.

<sup>1065</sup> ICC-01/04-01/06-2748-Conf, para. 185.

<sup>1066</sup> T-174-CONF-FRA-CT, p. 38, line 23, to p. 39, line 3; T-175-CONF-FRA-CT, p. 60 lines 1-5; and T-178-CONF-FRA-CT, p. 75, line 4.

<sup>1067</sup> T-178-CONF-FRA-CT, p. 45, lines 13-18, and p. 46, lines 1-6.

<sup>1068</sup> T-178-CONF-FRA-CT, p. 66, lines 9-11.

<sup>1069</sup> T-178-CONF-FRA-CT, p. 37, line 8, to p. 39, line 23.

<sup>1070</sup> T-177-CONF-FRA-CT, p. 4, lines 8-10; T-178-CONF-FRA-CT, p. 21, lines 16-18.

a few days before 6 March 2003.<sup>1071</sup> Thomas Lubanga cannot, therefore, be held responsible for the composition of these troops.

*-The young recruits in Rwampara camp*

492. The witness stated that most of the recruits were of military age and that there were very few *kadogos*.<sup>1072</sup> At no time did he claim that these *kadogos* were under the age of 15 years.

*- The registration of recruits*

493. The witness could not state with certainty whether the age of the recruits was indicated in the enlistment register. However, he pointed out that the age usually had to be stated.<sup>1073</sup> He thereby underscored the existence of a rule aimed at monitoring the age of the recruits.

*- Soldiers assigned to the guard of members of the General Staff.*

494. The witness confirmed that Bosco Ntaganda's guards were adults; he stated that *kadogos* were assigned to guard his residence, but did not claim that they were under the age of 15 years.<sup>1074</sup>

495. The witness claimed that the President's escort was composed of adults and children, but did not at any time say that these "children" were under the age of 15 years. This was also true for the escorts of the other members of the General Staff.<sup>1075</sup>

## **5.5 Recruitment of FPLC soldiers**

*- The absence of a planned recruitment policy*

496. The witness pointed out that recruitment was not a planned practice.<sup>1076</sup> He confirmed that there was no recruitment plan and listed different

<sup>1071</sup> T-178-CONF-FRA-CT, p. 19, lines 22-3. Confirmed by D01-0019: T-341-FRA-ET, p. 23, lines 18-28.

<sup>1072</sup> T-175-CONF-FRA-CT, p. 75, lines 10-16.

<sup>1073</sup> T-175-CONF-FRA-CT, p. 82, lines 3-11.

<sup>1074</sup> T-175-CONF-FRA-CT, p. 83, lines 15-17.

<sup>1075</sup> T-176-CONF-FRA-CT, p. 48, line 7, to p. 49, line 7.

<sup>1076</sup> T-175-CONF-FRA-CT, p. 61, lines 2-4.

circumstances in which young people voluntarily joined the army. He pointed out that some young people tried to join the army despite the refusal of the military authorities, who either drove them away,<sup>1077</sup> or sent them to headquarters “[TRANSLATION] so that they would be there not as soldiers, but just to stay there and be looked after there. So they would be fed and would stay just there at the headquarters but they were not sent off to war”.<sup>1078</sup>

497. On this point, the Prosecutor seriously misrepresents the witness’s statement: at no time did the witness state that recruitment was a practice which “was entrenched within the UPC/FPLC philosophy and was an established procedure” [emphasis added];<sup>1079</sup> on the contrary, he pointed out that these were the personal initiatives of certain commanders, which were not subject to reporting and which, in fact, could lead to sanctions if discovered.<sup>1080</sup>

498. The witness claimed that as [REDACTED], he himself had an opportunity to order the return of a child who was under the enlistment age.<sup>1081</sup> This decision, taken by [REDACTED], confirms the rules in force in the FPLC prohibiting the recruitment of minors.

499. The Prosecutor seriously misrepresents the witness’s testimony by claiming that “the accused was provided with reports of villages that refused to provide recruits”.<sup>1082</sup> At no time did the witness, or any other witness, suggest that reports on recruitment had been sent to the Accused. The witness merely alleged a discussion between a certain Mafuta and Thomas Lubanga on the Bogoro massacre.<sup>1083</sup>

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<sup>1077</sup> T-177-CONF-FRA-CT, p. 54, line 21, to p. 55, line 3, and p. 55, line 22, to p. 56, line 3. See also EVD-OTP-00681, p. 0540, lines 133-137.

<sup>1078</sup> T-177-CONF-FRA-CT, p. 56, lines 6-16.

<sup>1079</sup> ICC-01/04-01/06-2748-Conf, para. 167.

<sup>1080</sup> T-175-CONF-FRA-CT, p. 63, line 7, to p. 64, line 8.

<sup>1081</sup> T-177-CONF-FRA-CT, p. 57, line 3, to 58, line 7, and p. 59, line 24, to p. 60, line 8.

<sup>1082</sup> ICC-01/04-01/06-2748-Conf, para. 180.

<sup>1083</sup> T-176-CONF-FRA-CT, p. 21, line 15, to 23, line 4.

- *The role attributed to dignitaries*

500. The witness claimed to have learned from Bosco Ntaganda that “[TRANSLATION] old Gegere elders” had asked the people to provide “[TRANSLATION] young people” for the army:<sup>1084</sup> “[TRANSLATION] it was the people in the village who encouraged the population to mobilise the youths to join the army”.<sup>1085</sup>
501. He claimed that, amongst them, “[TRANSLATION] old Mafuta”, a UPC member, appeared to be the most influential and frequently met Thomas Lubanga.<sup>1086</sup> Contrary to what the Prosecutor stated, the witness did not report any “pressure” or other forms of coercion.<sup>1087</sup>
502. These assertions prompt the following comments:
- No dignitary called Mafuta was a founder of the UPC or a member of the UPC; none of the documents procured from the UPC archives and filed in the record of the case mentions this name.
  - The witness stated that he never attended a meeting between Mafuta and Thomas Lubanga and did not know the subject of their alleged discussions.<sup>1088</sup>
  - The witness stated that Mafuta did not hold any other position in the UPC and stated that he did not know if his mission was to encourage the young people to join the army.<sup>1089</sup>
  - At no time did the witness, who claimed to have had discussions with Mafuta and to have witnessed certain meetings between Thomas Lubanga and Mafuta, state that during these discussions (the content of

<sup>1084</sup> T-174-CONF-FRA-CT, p. 31, line 25, to p. 32, line 6.

<sup>1085</sup> T-175-CONF-FRA-CT, p. 78, lines 25 *et seq.*

<sup>1086</sup> T-174-CONF-FRA-CT, p. 33, lines 13-25.

<sup>1087</sup> ICC-01/04-01/06-2748-Conf, para. 180.

<sup>1088</sup> T-174-CONF-FRA-CT, p. 35, lines 7-11.

<sup>1089</sup> T-174-CONF-FRA-CT, p. 35, line 24, to p. 36, line 6.

which is formally contested by the Accused), instructions were issued to Mafuta regarding military recruitment.<sup>1090</sup>

503. There is nothing in the testimony to establish that these “Gegere elders”, and in particular the one called Mafuta, had acted upon the instructions of the UPC authorities to encourage the enlistment of recruits into the FPLC.

#### **5.6 The role attributed to UPC cadres**

504. During cross-examination, the witness specified the role he attributes to the UPC “elders” or “cadres”.<sup>1091</sup>

505. He stated that their role was to explain to the people the history of the movement and its objectives so as to convince the civilian population to back the movement. These political awareness-raising initiatives led by civilians cannot in any way be likened to military recruitment operations.

506. In any event, the witness acknowledged that he did not know how these cadres were trained and had never personally witnessed awareness-raising activities in the villages carried out, as he said, by the “elders” or by “[TRANSLATION] UPC cadres”;<sup>1092</sup> he did not disclose the source of his information. His testimony in this regard is therefore wholly unreliable.

#### **5.7 Forcible recruitment**

507. At no time did the witness raise the existence of forcible enlistment of recruits into the FPLC. On the contrary, he confirmed his previous statements that various situations and motives (to protect their families, themselves and their property) could lead some young people to enlist voluntarily.<sup>1093</sup>

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<sup>1090</sup> T-174-CONF-FRA-CT, p. 36, lines 4-6, and T-176-CONF-FRA-CT, p. 18, lines 10-21, p. 21, lines 4-11.

<sup>1091</sup> T-177-CONF-FRA-CT, p. 46, line 22, to p. 47, line 3; p. 47, lines 21-23; p. 48, line 23, to p. 49, line 10; and p. 52, lines 5-7.

<sup>1092</sup> T-177-CONF-FRA-CT, p. 49, line 22, to p. 51, line 14.

<sup>1093</sup> T-177-CONF-FRA-CT, p. 54, lines 1-15, and p. 52, lines 6-7.

### 5.8 Participation of children under the age of 15 years in hostilities

508. The witness claimed that *kadogos* had to take part in the fighting.<sup>1094</sup>
509. However:
- This was a general statement on the ordinary career of a recruit within the FPLC. The witness did not claim to have witnessed personally or to have been personally informed about the participation of *kadogos* in specifically identified battles.
  - The witness did not claim that these *kadogos* were under the age of 15 years.

### 5.9 Demobilization measures

510. The witness claimed not to have been informed about the demobilization measures taken by Thomas Lubanga.<sup>1095</sup>
511. Whatever the credibility of this assertion, it should be noted that the witness did not call into question the authenticity of the documents presented to him or the scope of their content; he merely pointed out that since he was not the addressee, he was not informed about them.<sup>1096</sup>

### 5.10 – Other matters

512. The witness confirmed that there were no ranks in the FPLC.<sup>1097</sup>
513. The witness confirmed that a high proportion of general staff members and FPLC commanders were not from Ituri and a significant number were of Tutsi origin.<sup>1098</sup>

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<sup>1094</sup> T-176-CONF-FRA-CT, p. 44, line 23, to p. 45, line 5.

<sup>1095</sup> T-176-CONF-FRA-CT, p. 57, lines 5-6.

<sup>1096</sup> T-176-CONF-FRA-CT, p. 61, lines 3-6.

<sup>1097</sup> T-176-CONF-FRA-CT, p. 41, lines 6-11.

<sup>1098</sup> T-178-CONF-FRA-CT, p. 48, lines 2-12; p. 49, lines 4-17; p. 52, line 25, to p. 55, line 2; p. 58, lines 12-19; p. 58, line 25, to p. 59, line 15; and p. 62, lines 16-18.

514. The witness confirmed that commanders Chaligonza, Kasangaki and Munyalizi deserted from the FPLC with their troops in March 2003 to establish PUSIC.<sup>1099</sup>
515. The witness claimed to have been appointed [REDACTED] after the Mongbwalu attack.<sup>1100</sup>

#### **6. DRC-OTP-WWWW-0089 ([REDACTED])**

516. Witness W-0089 claimed that his name is [REDACTED] and that he was born on [REDACTED] 1985 in [REDACTED], to [REDACTED] and [REDACTED].<sup>1101</sup> He claimed to have been forcibly enlisted into the UPC armed wing, where he allegedly acted as trainer for recruits and as bodyguard. He claimed to have taken part in fighting.
517. The Defence's cross-examination, the testimony of [REDACTED] W-0089's [REDACTED], and the documentary evidence revealed the crude mendacity of this testimony. They also brought to light the fact that W-0089 falsely told organisations in charge of demobilization that he had belonged to an armed group for the purpose of benefitting from their assistance.

#### **6.1 W-0089's manifestly mendacious testimony**

518. The testimonies [REDACTED] (D01-0009)<sup>1102</sup> and [REDACTED] (D01-0023) of W-0089 show that he never belonged to an armed group.<sup>1103</sup> W-0089 tried to conceal this lie and hamper any verifications by providing false information about his marital status and school attendance, in particular as follows:

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<sup>1099</sup> T-178-CONF-FRA-CT, p. 61, lines 6-21.

<sup>1100</sup> T-174-CONF-FRA-CT, p. 51, line 21, to p. 52, line 1.

<sup>1101</sup> T-195-CONF-FRA-ET, p. 5, line 20, to p. 6, line 15.

<sup>1102</sup> W-0089 recognized D01-0009 as being [REDACTED] on a photograph: T-196-CONF-FRA-ET, p. 52, line 10, to p. 53, line 1, and EVD-D01-00089.

<sup>1103</sup> D01-0009: T-270-CONF-FRA-ET, p. 36, lines 17-19; p. 45, line 19, to p. 46, line 8; D01-0023: T-267-CONF-FRA-ET, p. 10, lines 11-13.

- Contrary to W-0089's testimony, D01-0009 clearly stated that W-0089's name was not [REDACTED],<sup>1104</sup> a statement also confirmed by W-0089's voting card.<sup>1105</sup>
- W-0089 stated in court that his father [REDACTED] is called [REDACTED],<sup>1106</sup> and denied that his father is called [REDACTED].<sup>1107</sup> However, D01-0009 specified that [REDACTED] name is [REDACTED] and that he bore no other name;<sup>1108</sup> this information is also confirmed by [REDACTED].<sup>1109</sup>
- W-0089 claimed that he is from the Lulu ethnic group, like his father, and that if people think they are northern Hemas, it is because his father grew up with northern Hemas.<sup>1110</sup> However, D01-0009 and D01-0023 clearly stated [REDACTED] to the northern Hema ethnic group<sup>1111</sup> and that (W-0089) belongs to the same ethnic group.<sup>1112</sup>
- W-0089 claimed to have attended primary school at EP [REDACTED] in [REDACTED] <sup>1113</sup> and denied having attended primary school in [REDACTED].<sup>1114</sup> W-0089 added that his parents lived in [REDACTED] during this time and that he was living with an aunt in [REDACTED].<sup>1115</sup> However, D01-0009 and D01-0023 testified that W-0089 did his entire

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<sup>1104</sup> T-270-CONF-FRA-ET, p. 45, lines 17-18.

<sup>1105</sup> EVD-OTP-00555 and EVD-OTP-00640.

<sup>1106</sup> T-195-CONF-FRA-ET, p. 6, lines 12-13.

<sup>1107</sup> T-196-CONF-FRA-ET, p. 53, lines 15-17.

<sup>1108</sup> T-270-CONF-FRA-ET, p. 27, lines 6-11.

<sup>1109</sup> EVD-D01-00129.

<sup>1110</sup> T-196-CONF-FRA-ET, p. 62, lines 6-15, and p. 63, lines 1-8.

<sup>1111</sup> D01-0009: T-270-CONF-FRA-ET, p. 27, line 21; D01-0023: T-266-CONF-FRA-CT, p. 32, lines 1-5.

<sup>1112</sup> T-270-CONF-FRA-ET, p. 31, lines 19-21.

<sup>1113</sup> T-195-CONF-FRA-ET, p. 6, line 18, and p. 7, lines 11-14.

<sup>1114</sup> T-196-CONF-FRA-ET, p. 65, lines 20-22.

<sup>1115</sup> T-196-CONF-FRA-ET, p. 64, lines 5-10.

primary schooling in [REDACTED],<sup>1116</sup> and that W-0089 lived with his parents during this entire period.<sup>1117</sup>

- W-0089 claimed to have lived in [REDACTED] with an aunt called [REDACTED] after having undergone military training in Rwampara.<sup>1118</sup> Yet, D01-0009 stated that he did not know anyone of that name,<sup>1119</sup> and added that W-0089 had always lived with [REDACTED] until he disappeared for good.<sup>1120</sup> W-0023 also added that W-0089 lived [REDACTED] at his parents' home until he disappeared in 2006 or 2007.<sup>1121</sup>

519. Furthermore, numerous contradictions and absurd implausibilities deprive W-0089's testimony of all credibility, in particular the following:

- W-0089 stated that, after having been abducted by UPC soldiers, the soldiers whipped the recruits to convince them not to attempt to escape.<sup>1122</sup> Yet, W-0089 stated that when he was at the training centre, he could leave the centre to go "[TRANSLATION] to the surrounding areas".<sup>1123</sup>
- W-0089 claimed to have deserted after Mr Thomas Lubanga returned to Bunia from Kinshasa, but that from time to time, he went to the headquarters for the parade, to go for a walk, obtain information,<sup>1124</sup> and to run small errands.<sup>1125</sup> Thus, W-0089 stated that his commanders allowed him to live outside the camp with his weapon and accepted

<sup>1116</sup> D01-0009: T-270-CONF-FRA-ET, p. 31, lines 24-25; D01-0023: T-266-CONF-FRA-CT, p. 37, lines 10-14.

<sup>1117</sup> T-270-CONF-FRA-ET, p. 32, lines 1-5.

<sup>1118</sup> T-198-CONF-FRA-ET, p. 11, lines 2-8.

<sup>1119</sup> T-270-CONF-FRA-ET, p. 39, lines 22-24.

<sup>1120</sup> T-270-CONF-FRA-ET, p. 45, line 16.

<sup>1121</sup> T-266-CONF-FRA-CT, p. 40, line 16, to p. 41, line 6.

<sup>1122</sup> T-195-CONF-FRA-ET, p. 18, lines 19-25.

<sup>1123</sup> T-198-CONF-FRA-ET, p. 17, line 6, to p. 18, line 1.

<sup>1124</sup> T-196-CONF-FRA-ET, p. 20, lines 4-19.

<sup>1125</sup> T-198-CONF-FRA-ET, p. 24, lines 14-18.

that he go to headquarters only now and again to perform his duties there.<sup>1126</sup>

## **6.2 W-0089's participation in mendaciousness so as to benefit from the assistance of demobilization organisations**

520. [REDACTED] (D01-0023) testified that the suffering following the war in Ituri drove many civilians to pass themselves off as former soldiers to CONADER (*Commission Nationale pour le Désarmement, la Démobilisation et la Réinsertion* [National Commission for Disarmament, Demobilization and Reintegration]) for financial gain.<sup>1127</sup> Thus D01-0023, W-0089 and one [REDACTED] ([REDACTED]) falsely told CONADER that they had belonged to armed groups, in order to receive assistance provided to former members of armed militias.<sup>1128</sup> They also submitted a grant application for a [REDACTED] project from UNDP in cooperation with [REDACTED], an NGO.<sup>1129</sup> D01-0023 provided detailed explanations about this grant, his and [REDACTED] participation in the project, and the documents that were prepared for the grant application.<sup>1130</sup>

521. The answers which W-0089 provided to the Office of the Prosecutor during a telephone interview on 18 March 2010 confirm W-0089's participation in this mendacity, particularly regarding the following:

- W-0089 acknowledged that he took part in submitting a grant application through the NGO [REDACTED], for which [REDACTED] was acting as the group's representative,<sup>1131</sup> whilst knowing that D01-0023 had never been a member of an armed group.<sup>1132</sup>

<sup>1126</sup> T-198-CONF-FRA-ET, p. 24, lines 12-24.

<sup>1127</sup> T-266-CONF-FRA-CT, p. 43, lines 16 to 24.

<sup>1128</sup> T-266-CONF-FRA-ET, p. 62, line 15, to p. 63, line 25.

<sup>1129</sup> T-267-CONF-FRA-ET, p. 12, line 1, to p. 13, line 23.

<sup>1130</sup> EVD-D01-00127 and EVD-D01-00128.

<sup>1131</sup> EVD-D01-00985, pp. 0301-0302, lines 880-915.

<sup>1132</sup> EVD-D01-00985, pp. 0286-0287, lines 368-377.

- W-0089 acknowledged that the photograph on the demobilization card EVD-D01-00126 was indeed that of [REDACTED].<sup>1133</sup>
- W-0089 admitted that he had already seen the document from the NGO [REDACTED] concerning the [REDACTED] project for 9 demobilized people in Bunia (EVD-D01-00127), and that he did indeed participate in this grant application, which was never finalised.<sup>1134</sup> Nonetheless, W-0089 stated in court that the only demobilization organisations with which he had been in contact were UNDP and CONADER.<sup>1135</sup>
- W-0089 confirmed that the individuals who reported to CONADER for demobilization merely stated the armed group to which they claimed to have belonged and this information was never verified.<sup>1136</sup> He added that certain individuals went to CONADER even though they had never been members of an armed group.<sup>1137</sup>
- W-0089 acknowledged that he is indeed the person mentioned in entry [REDACTED] of the list of demobilized people appearing at page 2283 of document EVD-D01-00127, and acknowledged that the identification number ([REDACTED]) is the same as the one on his demobilization card.<sup>1138</sup>
- W-0089 acknowledged that one of the people on the list of the group members who submitted the grant application has the same name as one of his brothers, [REDACTED],<sup>1139</sup> but claimed not to know whether or not his brother [REDACTED] took part in this grant application.<sup>1140</sup>

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<sup>1133</sup> EVD-D01-00985, pp. 0285-0286, lines 317-339.

<sup>1134</sup> EVD-D01-00985, pp. 0294-0295, lines 610-663.

<sup>1135</sup> T-198-CONF-FRA-ET, p. 39, lines 10-15.

<sup>1136</sup> EVD-D01-00986, pp. 0307-0308, lines 96-118.

<sup>1137</sup> EVD-D01-00986, p. 0308, lines 142-143.

<sup>1138</sup> EVD-D01-00986, pp. 0316-0317, lines 396-428.

<sup>1139</sup> EVD-D01-00128, p. 2285, [REDACTED].

<sup>1140</sup> EVD-D01-00986, pp. 0318-0320, lines 491-562.

- Even though W-0089 claimed not to recognize his signature on the list of group members who took part in the grant application (EVD-D01-00128, p. 2285, entry 3), as well as on a meeting attendance list (EVD-D01-00128, p. 2286, entry 7), he recognized his name on these lists<sup>1141</sup> and the demobilization card number which appears on these documents is the same as the one that was issued to him by CONADER ([REDACTED]).<sup>1142</sup> These lists show that W-0089 presented himself to CONADER as a former member of the FNI,<sup>1143</sup> even though he stated during the trial that he had never been a member of any armed group other than the FPLC.<sup>1144</sup>

522. During his testimony, W-0089 admitted having lied to CONADER about his age so as to benefit from CONADER's assistance.<sup>1145</sup>

#### **7. DRC-OTP-WWWW-0299 ([REDACTED])**

##### **7.1 His assignment as bodyguard to Thomas Lubanga whilst Thomas Lubanga was President of UPC/RP**

523. W-0299 stated that he had been a soldier in the FPLC, assigned to headquarters. He claimed to have been assigned to Thomas Lubanga's guard in November and December 2002.<sup>1146</sup> Furthermore, W-0299 stated that he was at Thomas Lubanga's residence when he found out that W-0298 had been enlisted in the UPC forces, that is, in December 2002.<sup>1147</sup>

524. However, at the very end of his testimony before the Chamber, W-0299 admitted that he stopped acting as Thomas Lubanga's bodyguard from the point when Thomas Lubanga left Kinshasa for Mandro, in August 2002, but

<sup>1141</sup> EVD-D01-00986, pp. 0323-0324, lines 657-698.

<sup>1142</sup> EVD-D01-00092.

<sup>1143</sup> EVD-D01-00128, p. 2285, [REDACTED].

<sup>1144</sup> T-198-CONF-FRA-ET, p. 32, lines 7-9.

<sup>1145</sup> T-196-CONF-FRA-ET, p. 63, lines 21-24.

<sup>1146</sup> T-119-CONF-FRA-CT, p. 57, lines 2-3.

<sup>1147</sup> T-117-CONF-FRA-CT, p. 10, line 23, to p. 11, line 6, and T-119-CONF-FRA-CT, p. 57, lines 19-24.

that he had been posted to Tchomia “[TRANSLATION] where arms used to be parachuted”.<sup>1148</sup>

525. This statement, made after the witness had claimed during the 4 days of his testimony before the Chamber that he had been Mr Thomas Lubanga’s bodyguard whilst he was the UPC President, shows that all his statements regarding the period from August 2002 until his alleged departure from the UPC between February and May 2003 are inaccurate and even deliberately mendacious. Their mendaciousness seriously affects the credibility of all the witness’s statements.

526. In any event, the witness’s contradictory statements about this period confirm that he was not Thomas Lubanga’s bodyguard between August 2002 and August 2003:

- During his testimony, W-0299 stated that he was in Tchomia when Thomas Lubanga returned from Kinshasa, and that he stayed there until November 2002.<sup>1149</sup> He stated that after spending a few days in Bunia, he was sent to Beni and stayed there until February.<sup>1150</sup>
- On 11 January 2008, W-0299 had told the investigators of the Office of the Prosecutor that he was based in Mandro after the UPC captured Bunia;<sup>1151</sup> he confirmed this statement during his interview with the Office of the Prosecutor on 13 January 2008, specifying that he was

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<sup>1148</sup> T-122-CONF-FRA-CT, p. 48, line 18, to p. 49, line 11. The fact that he was not in Bunia in December 2002 is confirmed by the application for participation as a victim, wherein it is stated that W-0298’s father was stationed in Beni before March 2003. ICC-01/04-01/06-1518-Conf-Anx, p. 16/30. Also confirmed by T-120-CONF-FRA-CT, p. 21, lines 8-10.

<sup>1149</sup> T-120-CONF-FRA-CT, p. 21, lines 8-13.

<sup>1150</sup> T-120-CONF-FRA-CT, p. 21, lines 13-23.

<sup>1151</sup> T-119-CONF-FRA-CT, p. 64, line 16, to p. 66, line 1.

providing military training<sup>1152</sup> there. Moreover, the witness contradicts himself on this last point.<sup>1153</sup>

- W-0299 claimed that no soldiers were specially posted to Thomas Lubanga's guard,<sup>1154</sup> and that this guard was composed of around 50 soldiers.<sup>1155</sup> These statements have been contradicted by the testimonies of many witnesses.<sup>1156</sup>
- The witness stated that he went to Mandro training camp in a van,<sup>1157</sup> whereas it has been shown that it was not possible to travel there by vehicle.<sup>1158</sup> Moreover, the witness himself had told the Office of the Prosecutor that the training camp was not accessible by vehicle.<sup>1159</sup>
- The witness claimed that Thomas Lubanga visited Mandro training camp after he returned from Kinshasa.<sup>1160</sup> This statement runs counter to his testimony that he was in Tchomia when Thomas Lubanga returned from Kinshasa, and that he remained there until November 2002.<sup>1161</sup>
- The witness claimed that Bosco ordered that a soldier be shot because he had sold his weapon.<sup>1162</sup> However, in his two statements provided to

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<sup>1152</sup> T-119-CONF-FRA-CT, p. 70, line 21, to p. 71, line 7.

<sup>1153</sup> T-117-CONF-FRA-CT, p. 15, lines 16-17.

<sup>1154</sup> T-119-CONF-FRA-CT, p. 57, lines 2-6.

<sup>1155</sup> T-119-CONF-FRA-CT, p. 60, lines 20-25.

<sup>1156</sup> W-0019: T-189-CONF-FRA-CT, p. 35, lines 18-22, and p. 38, lines 13-15; W-0055: T-176-CONF-FRA-CT, p. 48, lines 21-23; p. 49, lines 14-16 and lines 19-23; D01-0011: T-347-CONF-FRA-ET, p. 59, lines 7-11; and D01-0019: T-340-FRA-CT, p. 37, lines 19-23.

<sup>1157</sup> T-119-CONF-FRA-CT, p. 50, lines 19-25.

<sup>1158</sup> W-0016: T-191-CONF-FRA-CT, p. 35, lines 10-25.

<sup>1159</sup> In his statement of January 2008, W-0299 stated that the Mandro training camp was not accessible by vehicle: T-119-CONF-FRA-CT, p. 64, lines 16-21.

<sup>1160</sup> T-120-CONF-FRA-CT, p. 20, lines 12-14.

<sup>1161</sup> T-120-CONF-FRA-CT, p. 21, lines 8-13.

<sup>1162</sup> T-117-CONF-FRA-CT, p. 19, lines 11-24, and p. 20, lines 6-8.

the Office of the Prosecutor in January 2008, the witness had stated that Kisembo had issued this order.<sup>1163</sup>

527. In light of the foregoing, no credibility can be attached to this witness's statements.

### 7.2 Certain statements of Witness W-0299

528. On several occasions, the Prosecutor seriously misrepresents this witness's statements. For example:

- Contrary to the Prosecutor's assertion,<sup>1164</sup> W-0299 never stated that Bosco and Kisembo regularly met with Mr Lubanga to discuss military matters. In any event, none of the statements of this witness can be considered reliable for this period for the aforementioned reasons.<sup>1165</sup>
- Contrary to what is stated in paragraph 193 of the Prosecutor's brief, the witness never said that he led the recruits during gymnastics in Bule.<sup>1166</sup>
- Contrary to what the Office of the Prosecutor asserts in paragraph 267, the witness generally referred to individuals around him.<sup>1167</sup> The witness did not mention any visit to Mandro.<sup>1168</sup>
- The Prosecutor argues that W-0299 stated that there were female bodyguards aged between 25 and 15 years and even under the age of 15 years at Thomas Lubanga's residence whilst he was Minister for Defence.<sup>1169</sup> Yet, in the following line in the transcript, the witness

<sup>1163</sup> T-122-CONF-FRA-CT, p. 10, lines 19-24; p. 13, lines 11-21; and p. 14, line 16, to p. 15, line 17.

<sup>1164</sup> ICC-01/04-01/06-2748-Conf, para. 256.

<sup>1165</sup> ICC-01/04-01/06-2748-Conf, para. 81, footnote 139. See T-122-CONF-FRA-CT, p. 41, lines 1-4.

<sup>1166</sup> T-119-CONF-FRA-CT, p. 76, lines 9-23: this concerns Mandro camp and not Bule camp. The interpreter corrected himself by explaining that the word "bule" in Swahili means "[TRANSLATION] to do nothing".

<sup>1167</sup> ICC-01/04-01/06-2748-Conf, para. 267.

<sup>1168</sup> T-117-CONF-FRA-CT, p. 21, lines 15-19.

<sup>1169</sup> ICC-01/04-01/06-2748-Conf, para. 301.

asserts the contrary: “[TRANSLATION] When I was working as a bodyguard whilst he was Minister for Defence, there were no women”.<sup>1170</sup>

529. W-0299 stated that he saw “children” of 15, 25 and 35 years old, and even under the age of 15 years.<sup>1171</sup> However, the witness himself mentioned that he has difficulty estimating the age of individuals and that it was not his role.

### **7.3 Reasons justifying the witness’s application for participation as a victim before the Court**

530. It should be noted that the witness stated that he completed the participation form in his son’s name, believing that his son would thus receive a demobilization kit.<sup>1172</sup>

## **8. DRC-OTP-WWWW-0002 ([REDACTED])**

### **8.1 The witness’s reliability**

531. Just as in the case of Witness W-0030, W-0002’s testimony revealed that he only worked as [REDACTED],<sup>1173</sup> and that he was principally called to testify during the trial in order to authenticate audio-visual evidence; his testimony is, therefore, limited in scope.

### **8.2 The presence of children under the age of 15 years in the UPC**

532. W-0002 did not provide any specific details about the age of the UPC soldiers with whom he might have been in contact. Even though W-0002 was called to comment on videos showing young soldiers, he was unable to provide any specific details on their age or identity.<sup>1174</sup>

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<sup>1170</sup> T-122-CONF-FRA-CT, p. 26, lines 2-20.

<sup>1171</sup> T-117-CONF-FRA-CT, p. 14, lines 18-22.

<sup>1172</sup> T-119-CONF-FRA-CT, p. 18, line 19, to p. 19, line 13.

<sup>1173</sup> T-160-CONF-FRA-CT, p. 68, lines 5-10.

<sup>1174</sup> See, in particular, T-162-CONF-FRA-CT, p. 50, lines 8-18.

## 9. DRC-OTP-WWWW-0030 ([REDACTED])

### 9.1 The witness's credibility

533. W-0030 specified that during the period of the charges, he did not undertake any actual [REDACTED] work, limiting himself to [REDACTED],<sup>1175</sup> and that it was only in this capacity that he had contact with representatives from the UPC/RP.<sup>1176</sup> W-0030 was principally called to testify during the trial in order to authenticate audio-visual evidence; therefore his testimony is of limited scope.
534. The fact that W-0030 introduced Intermediary W-0143 as his friend and that he received potential evidence<sup>1177</sup> from him must, also, be taken into account in the assessment of this witness's credibility in light of the fraudulent manoeuvres of this intermediary. The Defence wishes to point out that it did not have any information regarding W-0143 when W-0030 appeared before the Court.

### 9.2 The presence of child soldiers in the UPC

535. On several occasions during his testimony, W-0030 stated that he had observed the presence of young soldiers in the ranks of the UPC/RP, whose ages he estimated as ranging from around 9 years to adulthood.<sup>1178</sup> However, this is only a visual assessment by the witness of these individuals' ages.
536. W-0030 also maintained that he saw at Thomas Lubanga's residence bodyguards whose age ranged from 9 to adulthood.<sup>1179</sup> During cross-examination, however, he confirmed having told Office of the Prosecutor investigators that the *kadogos* he saw at headquarters seemed to be aged

<sup>1175</sup> T-130-CONF-FRA-CT, p. 93, lines 17-24.

<sup>1176</sup> T-130-CONF-FRA-CT, p. 94, lines 16-25.

<sup>1177</sup> EVD-D01-01037, p. 5788, line 8.

<sup>1178</sup> See, in particular, T-128-CONF-FRA-CT, p. 21, lines 6-18; p. 23, lines 12-22; p. 47, lines 13-14; p. 48, lines 7-12; p. 61, lines 13-22; and p. 64, lines 1-6.

<sup>1179</sup> T-128-CONF-FRA-CT, p. 20, lines 12-19.

between 14 and 15 years, and specified that he estimated these soldiers' ages solely on the basis of their physical appearance.<sup>1180</sup>

## 10. DRC-OTP-WWWW-0012 ([REDACTED])

### 10.1 The reliability of the testimony

537. Firstly, the witness stated that he was [REDACTED] of the "*Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo*" (PUSIC) from its creation until [REDACTED].<sup>1181</sup> The leading role he played in a political and military group made up of UPC dissidents hostile to Thomas Lubanga calls for the greatest caution in the assessment of the probative value of his testimony.
538. Secondly, the witness's statements concern mainly events that he did not personally witness.
539. Indeed, although his testimony concerns events that took place for the most part in Bunia and Ituri, the witness acknowledged having been absent from Ituri when most of these events allegedly occurred.
540. Thus he confirmed having travelled to [REDACTED] and being absent from Bunia between April 2002 and late July, then between mid-August 2002 and 17 March 2003,<sup>1182</sup> that is, during the crucial periods of this case. In particular, he acknowledged being absent from Bunia when Thomas Lubanga returned to Bunia in late August 2002.<sup>1183</sup> He also confirmed having stayed many times in [REDACTED] between 1999 and 2002, and particularly during the turmoil in Bunia; he specified that his stays in [REDACTED] led him to rent a house in [REDACTED] and that his children continued their studies there; he confirmed, in particular, having stayed in [REDACTED] in September 2000.<sup>1184</sup>

<sup>1180</sup> T-131-CONF-FRA-CT, p. 8, line 9, to p. 9, line 18.

<sup>1181</sup> T-169-CONF-FRA-CT, p. 32, line 11, to p. 33, line 16, and p. 40, lines 3-8.

<sup>1182</sup> T-169-CONF-FRA-CT, p. 22, line 22, to p. 23, line 12.

<sup>1183</sup> T-169-CONF-FRA-CT, p. 23, lines 9-12, and T-168-CONF-FRA-CT, p. 87, lines 2-11.

<sup>1184</sup> T-169-CONF-FRA-CT, p. 24, line 15, to p. 25, line 9, and p. 25, line 20, to p. 27, line 1.

541. Accordingly, it can be deduced that the witness did not personally witness the events that occurred in Ituri during these periods; however, he was not reticent in describing these events readily and in great detail during his testimony before the Chamber.
542. Furthermore, he acknowledged on many occasions that he did not witness the events that he was recounting, and that he was merely repeating what third parties had said,<sup>1185</sup> without providing any specific details about the dates and circumstances of what he may have been told in confidence.
543. Most of his testimony is not, therefore, sufficiently reliable.

### 10.2 The 2000 mutiny

544. The witness confirmed a prior statement in which he specified: “[TRANSLATION] I was not an eyewitness to the events, and everything I know about them comes from discussions I had later on with some of the participants”.<sup>1186</sup> The witness did not specify on what date following the events concerned these discussions allegedly took place, thus further diminishing the limited reliability of this hearsay evidence.
545. He acknowledged that he did not know about Thomas Lubanga’s supposed actions in favour of the mutineers. He specified that he was not in Ituri during this time, thus demonstrating his inability to testify meaningfully about these events.<sup>1187</sup>
546. The witness’s statements about the circumstances of this mutiny and Thomas Lubanga’s alleged ties with the mutineers are therefore completely unreliable.

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<sup>1185</sup> Examples: T-168-CONF-FRA-CT, p. 29, lines 23-24: “[TRANSLATION] And General Tchaligonza who had explained to me that ...”; T-168-CONF-FRA-CT, p. 41, lines 11-12: “[TRANSLATION] Tchaligonza [...] said to me [...]”; T-168-CONF-FRA-CT, p. 46, lines 11-12: “[TRANSLATION] It was Chief Kahwa who explained to me [...]”; T-168-CONF-FRA-CT, p. 73, lines 23-24: “[TRANSLATION] But according to Floribert Kisembo [...]”, etc.

<sup>1186</sup> T-169-CONF-FRA-CT, p. 27, line 25, to p. 28, line 11.

<sup>1187</sup> T-168-CONF-FRA-CT, p. 25, lines 11-19.

Moreover, the witness highlighted that “[TRANSLATION]... the one who looked after these children was Tibasima John and not Thomas Lubanga”.<sup>1188</sup>

### 10.3 The formation of the UPC’s armed wing

547. The witness claimed that he was in Bunia in early August 2002 when Governor Molondo Lompondo was driven out.<sup>1189</sup>
548. According to his understanding, “[TRANSLATION] groups of Hema soldiers attacked the residence of Molondo; Colonel Molondo who represented...who was governor at the time, and they began to fight among themselves. They were supported by the Ugandan army and Molondo fled and left Bunia to the Hema soldiers and the UPC, one might say, and that is why, when Mr Thomas Lubanga returned, he returned and he found that the city was already under the control of his fellow Hema”.<sup>1190</sup> He emphasised the initiatives of Chief Kahwa, chief of a *collectivité*, regarding the supply of arms from Rwanda to the “[TRANSLATION] Hema militia members”.<sup>1191</sup>
549. He was of the opinion that when Thomas Lubanga returned to Bunia “[TRANSLATION] it was at that moment that the UPC became organised; it then became organised around Thomas Lubanga”,<sup>1192</sup> and that in early September 2002, following Thomas Lubanga’s return, the “[TRANSLATION] groups of Hema militia members” set up their own government within the framework of the UPC.<sup>1193</sup>

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<sup>1188</sup> T-168-CONF-FRA-CT, p. 25, lines 7-10.

<sup>1189</sup> T-168-CONF-FRA-CT, p. 45, lines 10-23.

<sup>1190</sup> T-168-CONF-FRA-CT, p. 44, line 23, to p. 45, line 9.

<sup>1191</sup> T-168-CONF-FRA-CT, p. 44, line 12, and p. 46, lines 9-24.

<sup>1192</sup> T-168-CONF-FRA-CT, p. 44, lines 19-20.

<sup>1193</sup> T-168-CONF-FRA-CT, p. 47, line 23, to p. 48, line 2.

550. Thus:

- The witness attributed the capture of Bunia in August 2002 to a group of Hema soldiers/militia members supported by Ugandan forces; he emphasised the role of Chief Kahwa, *collectivité* chief in Mandro.
- At no time did the witness claim that UPC members or Thomas Lubanga were involved in this event.
- The witness confirmed that it was only from September 2002 that the UPC became organised in Bunia around Thomas Lubanga.

551. Thus he confirmed that, in his understanding, the armed forces which took part in the capture of Bunia and which declared their allegiance to Thomas Lubanga in September 2002 were formed and acted autonomously before this date and, in particular, without Thomas Lubanga's contribution.

#### **10.4 The presence of child soldiers**

552. The witness stated that he had seen children, some of whom were under the age of 15 years, in the armed groups present in Ituri. However, the witness did not specifically state whether some of these children under the age of 15 years were in the UPC's armed wing.<sup>1194</sup> This lack of precision precludes any inferences as to the presence of children under the age of 15 years within the FPLC. It should be emphasised that, in the rest of his explanations, the witness mainly mentioned child soldiers present in the ranks of PUSIC.<sup>1195</sup>

553. The witness claimed to have seen UPC child soldiers in a military hospital.<sup>1196</sup> However, he did not specify whether in his opinion these children were under the age of 15 years, and did not provide any specific details about any

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<sup>1194</sup> T-168-CONF-FRA-CT, p. 78, lines 2-7.

<sup>1195</sup> T-168-CONF-FRA-CT, p. 81, lines 16-20.

<sup>1196</sup> T-168-CONF-FRA-CT, p. 75, line 24, to p. 76, line 10.

information that would have enabled him to link these children to the UPC with certainty.

554. The witness claimed that on 12 May 2003 in the town of Bunia, he saw a 12-year-old child belonging to the UPC armed with a Kalashnikov. However, the witness acknowledged that this child was wearing “[TRANSLATION] ordinary clothing, with a wrapper”.<sup>1197</sup> This observation casts serious doubt on whether this child belonged to the FPLC, all of whose trained soldiers were equipped with uniforms. Moreover, the witness did not provide any convincing details about the information that would have enabled him to link this child to the UPC with certainty. On the contrary, his statements clearly reveal that this child, supposing that he or she existed, belonged to the troops of commander Tchaligonza,<sup>1198</sup> who had defected from the UPC since 6 March 2003 to join Kahwa’s PUSIC,<sup>1199</sup> of which he became Chief of Staff.<sup>1200</sup> The witness’s insistence on attributing to the UPC child soldiers who in fact belonged to other armed groups reveals a malicious intent towards the Accused that voids his incriminatory allegations of all credibility.
555. Generally speaking, the witness did not provide any indication as to the information that enabled him to assess the age of the child soldiers that he mentioned during his testimony.
556. Finally, the Prosecutor ascribes to the witness the statement that children were authorized to join the UPC army regardless of their age.<sup>1201</sup> The Prosecutor seriously misrepresents the witness’s statement: this allegation was directed solely at the young people sent to Uganda in 2000, whose recruitment is not

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<sup>1197</sup> T-168-CONF-FRA-CT, p. 79, lines 1-20, and p. 80, lines 9-16.

<sup>1198</sup> This is evident from the combined analysis of the statements in T-168-CONF-FRA-CT, p. 82, lines 1-22, and the cross-examination: T-169-CONF-FRA-CT, p. 48, line 4, to p. 50, line 21.

<sup>1199</sup> OTP-0055: T-178-CONF-FRA-CT, p. 61, lines 6-21.

<sup>1200</sup> T-169-CONF-FRA-CT, p. 46, lines 1-2. See also EVD-D01-00086.

<sup>1201</sup> ICC-01/04-01/06-2748-Conf, para. 168, footnote 333: “at any age they were allowed to join the army”.

ascribed to the UPC, and does not at all concern the FPLC recruits between 2002 and 2003.<sup>1202</sup> Likewise, the Prosecutor ascribed to the witness the statement that the UPC allegedly pressurised the local people in order to obtain recruits, whereas the excerpt quoted makes no reference to the UPC and concerns the year 2000.<sup>1203</sup>

#### **10.5 Demobilization measures**

557. The witness emphasised that there was no communication with experts from MONUC or other organisations about the demobilization of child soldiers from the armed groups before March or April 2003; he situated the first meetings on this matter around late August or early September 2003.<sup>1204</sup>

558. He explained that at this point “[TRANSLATION] they knew we had children, but we could not demobilize them because we did not know where to put them”.<sup>1205</sup>

#### **10.6 The existence of an international conflict**

559. The witness confirmed that Uganda delivered arms to PUSIC.<sup>1206</sup>

#### **10.7 The autonomy of the FPLC command structure vis-à-vis Thomas Lubanga**

560. The witness stated that in March 2003, [REDACTED], UPC “[REDACTED]”,<sup>1207</sup> a member of the Lendu community, told him that he had a telephone conversation with Thomas Lubanga on 5 March 2003 during which Thomas Lubanga told him “[TRANSLATION] that the UPC forces were going to attack the Ugandan armed forces the next day and that he himself was against the attack but had been unable to ensure that his point of view prevailed”.<sup>1208</sup>

<sup>1202</sup> T-168-CONF-FRA-CT, p. 25, lines 4-10.

<sup>1203</sup> ICC-01/04-01/06-2748-Conf, para. 176, footnote 346.

<sup>1204</sup> T-168-CONF-FRA-CT, p. 84, lines 10-21.

<sup>1205</sup> T-168-CONF-FRA-CT, p. 84, lines 21-25.

<sup>1206</sup> T-169-CONF-FRA-CT, p. 53, lines 19-23.

<sup>1207</sup> [REDACTED] fulfilled the duties of [REDACTED] of the UPC: T-169-CONF-FRA-CT, p. 51, lines 2-15.

<sup>1208</sup> T-169-CONF-FRA-CT, p. 51, lines 2-15.

561. The fact that [REDACTED] confided this to the witness confirms that Thomas Lubanga, FPLC *de jure* commander-in-chief and political leader, was however not in a position to exercise, *de facto*, effective control over the movement's armed wing, with the military high command having real autonomous decision-making power, even regarding, as in the case in point, the most momentous decisions.

## 11. DRC-OTP-WWWW-0014 ([REDACTED])

### 11.1 The reliability of his testimony

562. W-0014's testimony mainly concerned events to which he was not an eyewitness. W-0014 acknowledged that he was absent from Ituri during the period of the charges, with the exception of a stay of unspecified duration in [REDACTED] around March or April 2003.<sup>1209</sup>

563. In June 1998, W-0014 started working for [REDACTED] in Uganda.<sup>1210</sup> W-0014 worked for [REDACTED] until [REDACTED].<sup>1211</sup> Afterwards, he continued working as [REDACTED].<sup>1212</sup> W-0014 remained in [REDACTED] some time after leaving [REDACTED], then he lived in [REDACTED] in Uganda, then in [REDACTED] in the DRC, and then in [REDACTED] in Uganda. W-0014 stated that for a very short period, he paid flying visits to Ituri.<sup>1213</sup>

564. From 1 February 2002 to 28 April 2002, W-0014 allegedly stayed in Sun City in South Africa.<sup>1214</sup> In early June 2002, he was allegedly invited to attend a meeting in Kampala in Uganda.<sup>1215</sup>

565. W-0014 stated that he stayed in [REDACTED] from 30 July 2002 to 20 August 2002.<sup>1216</sup> On 20 August 2002, W-0014 allegedly returned directly to [REDACTED]

<sup>1209</sup> T-182-CONF-FRA-CT, p. 25, lines 10-18.

<sup>1210</sup> T-179-CONF-FRA-CT, p. 12, lines 6-8.

<sup>1211</sup> T-179-CONF-FRA-CT, p. 14, lines 11-13.

<sup>1212</sup> T-179-CONF-FRA-CT, p. 14, lines 14-16.

<sup>1213</sup> T-179-CONF-FRA-CT, p. 17, lines 6-18.

<sup>1214</sup> T-179-CONF-FRA-CT, p. 36, lines 16-22.

<sup>1215</sup> T-179-CONF-FRA-CT, p. 41, lines 1-2, and p. 42, lines 4-8.

in Uganda;<sup>1217</sup> he appears not to have returned to the DRC in 2002<sup>1218</sup> and he never returned to [REDACTED].<sup>1219</sup>

566. W-0014 stated that following his departure from Ituri on 20 August 2002, he was able to follow what was happening there like any other citizen of the country.<sup>1220</sup>
567. Despite the fact that W-0014 was not an eyewitness of the events that occurred in Ituri during the period of the charges, he did not hesitate to comment freely on these events during his testimony before the Chamber.
568. Furthermore, he acknowledged on many occasions that he did not witness the events that he was recounting, and was merely repeating what other people had said,<sup>1221</sup> without providing any specific details about the date and circumstances of what people had confided to him.
569. Accordingly, his testimony essentially lacks sufficient reliability.

### **11.2 The June 2002 meeting in Kampala**

570. The Prosecutor relies on W-0014's testimony to allege that in June 2002, Thomas Lubanga led a UPC delegation to Kampala with a view to ousting President Nyamwisi and securing recognition of the UPC as the governing power in Ituri.<sup>1222</sup> However, this position is contradicted by Witness W-0041.<sup>1223</sup>
571. Moreover, W-0014's testimony about the Kampala meeting is replete with contradictions and implausibilities, in particular on the following points:

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<sup>1216</sup> T-179-CONF-FRA-CT, p. 63, line 21, to p. 64, line 4.

<sup>1217</sup> T-181-CONF-FRA-CT, p. 53, lines 13-16.

<sup>1218</sup> T-184-CONF-FRA-CT, p. 11, lines 19-22.

<sup>1219</sup> T-182-CONF-FRA-CT, p. 25, line 10.

<sup>1220</sup> T-181-CONF-FRA-CT, p. 53, line 13, to p. 54, line 2.

<sup>1221</sup> T-179-CONF-FRA-CT, p. 47, lines 10-13, and p. 55, lines 15-25; T-184-CONF-FRA-CT, p. 18, line 8, to p. 19, line 4; and T-181-CONF-FRA-CT, p. 53, line 17, to p. 54, line 2.

<sup>1222</sup> ICC-01/04-01-06-2748-Conf, paras. 97-100.

<sup>1223</sup> T-124-CONF-FRA-CT, p. 71, lines 13-16, and T-125-CONF-FRA-CT, p. 6, lines 17-20.

- W-0014 had told Office of the Prosecutor investigators that the delegation that travelled to Kampala in June 2002 wished to create a movement, the FRP, but that to his knowledge, this movement never came into being. Yet, the FRP had been in existence since April 2002.<sup>1224</sup>
- W-0014 had told Office of the Prosecutor investigators that he heard about the UPC as a movement for the first time during his June 2002 stay in Kampala. The witness subsequently sought to distance himself from this statement with explanations devoid of any credibility.<sup>1225</sup>
- W-0014 did not know whether all the members of the delegation to Kampala in June 2002 were UPC members.<sup>1226</sup> Nor was he able to say in what capacity [REDACTED] and [REDACTED] took part in this meeting.<sup>1227</sup>
- W-0014 claimed that whilst they were in Kampala in June 2002, Mr Thomas Lubanga ordered Mr Beiza and Mr Kahwa to procure arms in Rwanda. In fact, W-0014 merely inferred from Mr Kahwa's and Mr Beiza's absence that they had necessarily been sent by Mr Lubanga to Rwanda.<sup>1228</sup>
- W-0014 maintained that before being transferred from Kampala to Kinshasa, Mr Lubanga allegedly designated the people supposed to hold positions of responsibility in his absence.<sup>1229</sup> However, W-0014 acknowledged that Mr Lubanga's arrest and transfer to Kinshasa was a complete surprise to the delegation in Kampala,<sup>1230</sup> that this arrest caused a sort of panic or confusion, and that the detainees were directly

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<sup>1224</sup> T-184-CONF-FRA-CT, p. 36, lines 5-18, and EVD-OTP-00663.

<sup>1225</sup> T-184-CONF-FRA-CT, p. 33, line 4, to p. 34, line 12.

<sup>1226</sup> T-184-CONF-FRA-CT, p. 37, lines 4-12.

<sup>1227</sup> T-184-CONF-FRA-CT, p. 37, lines 13-20.

<sup>1228</sup> T-184-CONF-FRA-CT, p. 42, line 7, to p. 43, line 17.

<sup>1229</sup> T-184-CONF-FRA-CT, p. 44, line 9, to p. 45, line 11.

<sup>1230</sup> T-184-CONF-FRA-CT, p. 43, line 23, to p. 44, line 1.

transferred to the airport.<sup>1231</sup> Witness W-0041 moreover highlighted that the delegates were transferred by main force to Kinshasa and specified that no arrangements were made in Kampala other than those concerning the governor.<sup>1232</sup>

### 11.3 The witness's stay in Bunia from 30 July 2002 to 20 August 2002

572. W-0014 maintained that from 30 July to 20 August 2002, that is, before the period of the charges, he went every day to the UPC [REDACTED] in [REDACTED], where he saw military activities.<sup>1233</sup> W-0014 claimed that during his stay he saw children in the ranks of the UPC whose age he estimated to be between 5 and 18 years<sup>1234</sup> based on their physical appearance.<sup>1235</sup> However, he provided no specific example.
573. The fact that it was clearly demonstrated during the trial that the UPC did not have an armed wing during this period<sup>1236</sup> deprives this account of all credibility.
574. Furthermore, W-0014 claimed that during his stay, he was aware that the members of the delegation in Kampala who were transferred to and detained in Kinshasa could communicate from their place of detention.<sup>1237</sup> W-0014 claimed that Mr Richard Lonema communicated personally on at least two occasions with Mr Thomas Lubanga when Mr Thomas Lubanga was still detained in Kinshasa.<sup>1238</sup> W-0014 maintained that the detainees in Kinshasa communicated with mobile telephones, and that even the people detained at

<sup>1231</sup> T-184-CONF-FRA-CT, p. 43, line 18, to p. 44, line 8.

<sup>1232</sup> T-125-CONF-FRA-CT, p. 8, line 16, to p. 10, line 4.

<sup>1233</sup> T-179-CONF-FRA-CT, p. 61, lines 9-12, and p. 64, lines 2-4.

<sup>1234</sup> See, in particular, T-179-CONF-FRA-CT, p. 82, lines 11-12; T-182-CONF-FRA-CT, p. 36, line 5, to p. 37, line 22.

<sup>1235</sup> T-179-CONF-FRA-CT, p. 85, line 3, to p. 86, line 5.

<sup>1236</sup> T-342-FRA-ET, p. 4, line 25, to p. 5, line 4.

<sup>1237</sup> T-179-CONF-FRA-CT, p. 78, line 17, to p. 79, line 5.

<sup>1238</sup> T-179-CONF-FRA-CT, p. 74, line 4, to p. 75, line 15.

DEMIAP had mobile telephones that enabled them to call Bunia.<sup>1239</sup> Yet, it is completely implausible that such telephone communications took place, since at the time, as W-0014 himself acknowledged,<sup>1240</sup> communication through mobile telephones was impossible in Bunia. This part of W-0014's testimony is also contradicted by the testimony of Witness W-0041.<sup>1241</sup> Nevertheless, W-0014 specified that he had no personal knowledge of any of the alleged communications between the members of the delegation detained in Kinshasa and UPC headquarters in Bunia.<sup>1242</sup>

#### **11.4 The presence of children under the age of 15 years in the UPC during the period of the charges**

575. W-0014 maintained that in March or April 2003 in Aru, he saw a child aged about 12 years, one of the troops of commander Jérôme Kakwavu,<sup>1243</sup> detained in the dungeon, but that he was allowed to keep his weapon during his detention.<sup>1244</sup> The witness did not provide any details about this individual's identity or about how W-0014 could have estimated his age. Furthermore, it should be emphasised that commander Jérôme Kakwavu had defected from the UPC since March 2003,<sup>1245</sup> and that the UPC was no longer present in Aru at that time.<sup>1246</sup>

#### **11.5 Other evidence of the witness's lack of credibility**

576. W-0014 claimed to be able to identify certain ethnic groups based on their physical appearance.<sup>1247</sup> Nevertheless, at the same time, he stated that he himself, a [REDACTED],<sup>1248</sup> could pass for a Gegere,<sup>1249</sup> and was unable to

<sup>1239</sup> T-184-CONF-FRA-CT, p. 51, lines 1-9.

<sup>1240</sup> T-184-CONF-FRA-CT, p. 50, lines 1-15.

<sup>1241</sup> T-126-CONF-FRA-CT, p. 9, lines 17-24.

<sup>1242</sup> T-184-CONF-FRA-CT, p. 49, lines 1-14.

<sup>1243</sup> T-182-CONF-FRA-CT, p. 28, lines 3-8.

<sup>1244</sup> T-182-CONF-FRA-CT, p. 25, line 23, to p. 26, line 11, and p. 28, lines 7-8.

<sup>1245</sup> T-178-CONF-FRA-CT, p. 19, lines 5-23.

<sup>1246</sup> T-178-CONF-FRA-CT, p. 34, lines 3-9.

<sup>1247</sup> T-181-CONF-FRA-CT, p. 38, lines 14-18.

<sup>1248</sup> T-179-CONF-FRA-CT, p. 9, lines 18-19.

provide a coherent reply when he was asked to explain how it is possible to differentiate physically between members of the various ethnic groups.<sup>1250</sup>

577. W-0014 claimed that Bosco Ntaganda, whom he has never personally met, did not suffer from any mental illness, since he knows a certain number of doctors with whom he had been in contact, and none of these doctors had ever told to him that Bosco suffered from any mental illness or had undergone a psychiatric examination.<sup>1251</sup>
578. W-0014 claimed that Ms McAdams of MONUC worked with Bosco Ntaganda of the UPC to trade gold in Bunia,<sup>1252</sup> yet the witness did not even know that Ms McAdams was the head of MONUC in Ituri.<sup>1253</sup>

## **12. DRC-OTP-WWWW-0043 (JACQUES KABASELE NZEMBELE)**

579. W-0043's testimony has no actual relevance to this case. Essentially, W-0043 was called to explain the circumstances in which he was arrested and detained by the UPC/RP in November 2002.
580. Furthermore, the Prosecutor used W-0043's testimony to argue that Chief Kahwa, Richard Lonema, Jean-Pascal Ndukute, Etienne Nembe, Nestor Bamaraki and Mafuta Savo were members of the delegation that went to Kampala in June 2002.<sup>1254</sup> The Prosecutor also maintains that W-0043 testified that the UPC conducted mobilization and recruitment campaigns in villages.<sup>1255</sup> In fact, these two topics were not even mentioned by this witness, either in his written statement,<sup>1256</sup> or during his testimony before the Court.<sup>1257</sup>

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<sup>1249</sup> T-185-CONF-FRA-CT, p. 18, line 23, to p. 19, line 5, and p. 19, line 19, to p. 20, line 6; and T-181-CONF-FRA-CT, p. 40, lines 8-12.

<sup>1250</sup> T-184-CONF-FRA-CT, p. 19, lines 6-18.

<sup>1251</sup> T-184-CONF-FRA-CT, p. 15, line 16, to p. 16, line 6.

<sup>1252</sup> T-184-CONF-FRA-CT, p. 30, line 12, to p. 31, line 23.

<sup>1253</sup> T-184-CONF-FRA-CT, p. 29, line 13, to p. 30, line 11.

<sup>1254</sup> ICC-01/04-01/06-2748-Conf, para. 97, footnote 189.

<sup>1255</sup> ICC-01/04-01/06-2748-Conf, para. 176.

<sup>1256</sup> EVD-OTP-00731.

### 13. DRC-OTP-WWWW-0024 (NGABU KILO SERGE)

#### 13.1 The witness's credibility and the relevance of his testimony

581. A significant part of W-0024's testimony concerned events that occurred outside the period of the charges.
582. The witness stated that he was recruited by *SOS Grands Lacs* for a mission entrusted to it by UNICEF concerning the reintegration of disarmed children in Kyakwanzi in Uganda.<sup>1258</sup> He claimed that he joined the organisation in late August or September 2001<sup>1259</sup> and left his position in November 2002.<sup>1260</sup>
583. W-0024 maintained that these children were sent to Uganda in 2000 or early 2001,<sup>1261</sup> since the RCD/KML needed to increase its military personnel.<sup>1262</sup> He estimated that there were between 131 and 134 children,<sup>1263</sup> and he estimated the age range as being between eight and a half and 18 years old.<sup>1264</sup>
584. He stated that *SOS Grands Lacs's* programme for assisting these children started about two months before he joined the organisation,<sup>1265</sup> that is, around July 2001. *SOS Grands Lacs* only took charge of about fifty of these children and only managed to place 7 or 8 in vocational centres.<sup>1266</sup>
585. Accordingly, W-0024's testimony reveals that *SOS Grands Lacs's* demobilization programme concerned children from the RCD/KML, and allegedly occurred before the period of the charges.

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<sup>1257</sup> T-153-CONF-FRA-CT, p. 68-96.

<sup>1258</sup> T-170-CONF-FRA-CT, p. 35, lines 21-23; p. 60, line 22, to p. 61, line 6; and p. 37, lines 6-11.

<sup>1259</sup> T-170-CONF-FRA-CT, p. 39, lines 4-7.

<sup>1260</sup> T-170-CONF-FRA-CT, p. 55, lines 6-7.

<sup>1261</sup> T-170-CONF-FRA-CT, p. 39, lines 1-10.

<sup>1262</sup> T-170-CONF-FRA-CT, p. 38, lines 9-14.

<sup>1263</sup> T-170-CONF-FRA-CT, p. 41, lines 14-15.

<sup>1264</sup> T-170-CONF-FRA-CT, p. 46, lines 13-16.

<sup>1265</sup> T-170-CONF-FRA-CT, p. 39, lines 4-10.

<sup>1266</sup> T-170-CONF-FRA-CT, p. 49, line 25, to p. 50, line 9.

586. Moreover, the witness mentioned that he was arrested and detained by the UPC in October 2002.<sup>1267</sup> The resentment that the witness might have nursed against the UPC as a result of this arrest should be taken into account in the assessment of the credibility of his testimony.

### **13.2 The presence of child soldiers in the ranks of the UPC/RP**

587. W-0024 claimed that some of the children of Kyakwanzi who passed through *SOS Grands Lacs* were recruited by the UPC.<sup>1268</sup> However, he did not provide any specific details about the date and the circumstances of these enlistments, or about the identity or age of the children who were recruited.

588. W-0024 maintained that he was arrested and detained by the UPC in October 2002<sup>1269</sup> and that he was guarded by *kadogos* whose age he estimated to be 10, 11 or 12 years.<sup>1270</sup> W-0024 only visually assessed the ages of these individuals, whose identity was not provided.

589. He also claimed that in town he saw armed children aged 9 to 18 years within the FPLC.<sup>1271</sup> The witness did not specify at any time how he estimated the age of these children or the date on which he saw them.

### **13.3 Demobilization efforts**

590. W-0024 confirmed that about two months following the capture of Bunia by the UPC in 2002, he found out on television that the UPC had allegedly demobilized about twenty child soldiers.<sup>1272</sup>

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<sup>1267</sup> T-170-CONF-FRA-CT, p. 69, line 19, to p. 73, line 14.

<sup>1268</sup> T-170-CONF-FRA-CT, p. 50, lines 10-19.

<sup>1269</sup> T-170-CONF-FRA-CT, p. 70, lines 1-2, and p. 71, lines 20-21.

<sup>1270</sup> T-170-CONF-FRA-CT, p. 75, lines 10-11.

<sup>1271</sup> T-170-CONF-FRA-CT, p. 53, lines 19-20.

<sup>1272</sup> T-170-CONF-FRA-CT, p. 52, lines 1-24.

591. W-0024 claimed that on that occasion the UPC had “[TRANSLATION] pretended” to demobilize these children simply because, in his opinion, nothing changed afterwards. However, he did not provide further details.<sup>1273</sup>

### **13.4 The difficulties associated with demobilization**

592. The witness acknowledged that demobilization is a long and difficult process, since, in regard to the child “[TRANSLATION] you have to know him very well. [...] you have to have a certain general knowledge of his past”.<sup>1274</sup> Demobilization can only be done on a case-by-case basis “[TRANSLATION] because children, they’re all children, but they don’t have the same background; they don’t have the same past and also each child is in his own particular circumstances”.<sup>1275</sup>

## **14. DRC-OTP-WWWW-0116 ([REDACTED])**

593. Witness W-0116 claimed to have been [REDACTED] of [REDACTED] between 2000 and July 2002.<sup>1276</sup>

594. His statements concerned mainly the activities of [REDACTED] between April 2001 and May 2002 in the context of the operation to demobilize 165 Congolese children present at Kyakwanzi camp in Uganda.

### **14.1 Thomas Lubanga’s involvement in sending “children” to Kyakwanzi**

595. The witness claimed that Mr Thomas Lubanga was responsible for sending 703 young people to Uganda during the summer of 2000 in order to undergo training at Kyakwanzi camp,<sup>1277</sup> including some 15 to 20 children aged 13, 14 and 15 years.<sup>1278</sup>

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<sup>1273</sup> T-170-CONF-FRA-CT, p. 52, line 2 and lines 12-14.

<sup>1274</sup> T-170-CONF-FRA-CT, p. 99, lines 1-3.

<sup>1275</sup> T-171-CONF-FRA-CT, p. 5, lines 9-11.

<sup>1276</sup> T-209-CONF-FRA-ET, p. 32, lines 8-13.

<sup>1277</sup> T-203-CONF-FRA-ET, p. 29, line 18, to p. 30, line 3; p. 43, lines 5-19; and p. 44, lines 14-16.

<sup>1278</sup> T-203-CONF-FRA-ET, p. 32, lines 5-20.

596. W-0116's testimony about these matters is unreliable for the following reasons:

- W-0116 was not present in Ituri in the summer of 2000, when the recruits were sent to Uganda.<sup>1279</sup>
- Most of W-0116's testimony on this matter relied on facts that he did not know first-hand.
- At no time did the witness state that he had verified the information that was reportedly provided to him (including the children's age) by some of the children.<sup>1280</sup>
- The children's identity not having been disclosed to the Defence, it was unable to conduct its own investigations about the circumstances described or the accuracy of the information provided by these children.<sup>1281</sup>

597. Moreover, the witness inferred Thomas Lubanga's involvement from the fact that he expressed his wish to contribute to the demobilization operation by welcoming the children at the airport, and from the fact that he called the demobilized children "[TRANSLATION] his children".<sup>1282</sup> Furthermore, he claimed that Thomas Lubanga said that he sent these young people to Uganda.<sup>1283</sup>

598. Thomas Lubanga denies making such a statement, which was also contradicted by the testimonies of Witness W-0012<sup>1284</sup> and Witness W-0024,<sup>1285</sup>

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<sup>1279</sup> T-208-CONF-FRA-ET, p. 78, lines 19-21.

<sup>1280</sup> T-203-CONF-FRA-ET, p. 43, lines 5-19.

<sup>1281</sup> See the Chamber's Decision concerning the document entitled "[REDACTED]": T-205-CONF-FRA-ET, p. 3, lines 3-5.

<sup>1282</sup> T-203-CONF-FRA-ET, p. 46, line 6, to p. 47, line 4.

<sup>1283</sup> T-203-CONF-FRA-ET, p. 46, lines 11-15.

<sup>1284</sup> T-168-CONF-FRA-CT, p. 25, lines 7-10.

<sup>1285</sup> T-170-CONF-FRA-CT, p. 38, lines 9-14, and p. 45, lines 3-9.

an *SOS Grands Lacs* staff member, which exclude any involvement on the part of Thomas Lubanga in sending these recruits to Kyakwanzi.

599. The evidence presented instead shows that John Tibasima was responsible for sending the youths for training in Uganda.<sup>1286</sup>
600. As to Thomas Lubanga's intentions concerning the reintegration of the children who returned from Uganda, Michel Angaika's testimony confirmed that they were sincere. Thomas Lubanga, Commissioner for Youth and Sports, requested Michel Angaika, a teacher, to intervene as an expert consultant and devise activities that would encourage the social reintegration of the children who were to be repatriated from Uganda.<sup>1287</sup>

#### **14.2 The recruitment of children by Thomas Lubanga between 2001 and May 2002**

601. W-0116 claimed that despite this demobilization operation conducted by [REDACTED], Thomas Lubanga continued to recruit children clandestinely,<sup>1288</sup> including children demobilized by the [REDACTED] operation.<sup>1289</sup>
602. W-0116's testimony on this point is wholly unreliable:
- The witness specified that his organisation was unable to identify the individuals responsible for these re-recruitments.<sup>1290</sup>
  - The information provided by the witness is of a general nature.
603. Regarding the ages of the children targeted by the recruitment, at no time did the witness specify that they were children under the age of 15 years.<sup>1291</sup>

<sup>1286</sup> T-168-CONF-FRA-CT, p. 21, line 14, to p. 22, line 13, and p. 25, lines 4-10. D01-0026: T-254-CONF-FRA-CT, p. 2, lines 15-21.

<sup>1287</sup> T-346-FRA-ET, p. 60, lines 4-19.

<sup>1288</sup> T-203-CONF-FRA-ET, p. 53, lines 4-16.

<sup>1289</sup> T-203-CONF-FRA-ET, p. 54, line 19, to p. 55, line 9.

<sup>1290</sup> T-203-CONF-FRA-ET, p. 55, lines 13-21.

<sup>1291</sup> T-203-CONF-FRA-ET, p. 57, line 23, to p. 58, line 5.

### 14.3 Enlistment of children under the age of 15 years from after May 2002 until 2004

604. Even if the witness were considered to have been sincere, his testimony was extremely tangential and wholly unreliable.
605. Witness W-0116 was not present in Bunia from May 2002 and had stopped working for [REDACTED] from July 2002.<sup>1292</sup> Nevertheless, W-0116 stated that he had been informed, in his absence, of allegations of recruitment of children under the age of 15 years<sup>1293</sup> by the UPC between May 2002 and 2004.<sup>1294</sup>
606. Thus, he claimed that he became aware of this information, which was mentioned in [REDACTED] prepared by colleagues.<sup>1295</sup> These reports were not provided to the Defence, which was unable to verify their content and the accuracy of the information they contained.
607. Moreover, the witness mentioned photographs, one of which was allegedly received between May and August 2002, showing children aged 15 years and under<sup>1296</sup> in green khaki uniforms.<sup>1297</sup>
608. This allegation invites the following observations:
- The Defence was never aware of such photographs.
  - The witness acknowledged that he was unable to specify the true age of these children, and stated that he estimated their age by looking at their photographs.<sup>1298</sup>

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<sup>1292</sup> From August 2002, W-0116 worked for [REDACTED] in [REDACTED], [REDACTED]: T-203-CONF-FRA-ET, p. 94, lines 5-13.

<sup>1293</sup> T-203-CONF-FRA-ET, p. 95, lines 9-12. Children under the age of 15 years: T-208-CONF-FRA-ET, p. 59, line 7 to p. 60, line 2.

<sup>1294</sup> T-203-CONF-FRA-ET, p. 52, line 22, to p. 53, line 3, and p. 96, lines 4-12; T-208-CONF-FRA-ET, p. 58, line 17, to p. 59, line 6.

<sup>1295</sup> T-208-CONF-FRA-ET, p. 59, lines 10-25.

<sup>1296</sup> T-208-CONF-FRA-ET, p. 59, line 20, to p. 61, line 3.

<sup>1297</sup> T-209-CONF-FRA-ET, p. 72, lines 3-7.

<sup>1298</sup> T-208-CONF-FRA-ET, p. 60, lines 18-25.

- The uniforms worn by UPC soldiers were not khaki but camouflage-style;<sup>1299</sup> therefore these were not UPC soldiers.

#### **14.4 The enlistment of a child in Fataki**

609. The witness claimed that, following a mission by the UPC to Fataki during the second half of 2001, in which Mr Thomas Lubanga allegedly participated, a 14-year old child was re-recruited.<sup>1300</sup> Thomas Lubanga allegedly stated that he “[TRANSLATION] retook” this child because he had been abandoned by the [REDACTED] programme.<sup>1301</sup>
610. Mr Thomas Lubanga categorically denies having made this statement and contests being in Ituri from July to December 2001.
611. In any case, this event is not relevant to the case, since it occurred outside the period of the charges.

#### **14.5 The witness’s credibility and the reliability of his testimony**

612. Many factors cast doubt on the credibility of W-0116’s testimony:
613. Witness W-0116 claimed that he settled in Bunia between April 2001 and May 2002 in order to [REDACTED].<sup>1302</sup> This assertion is contradicted by Witness W-0024, an employee of *SOS Grands Lacs*, who stated that [REDACTED]. [REDACTED].<sup>1303</sup>
614. Certain statements made by Witness W-0116 are manifestly mendacious and cast doubt on the reliability of his whole testimony, particularly in the following instances:

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<sup>1299</sup> See for example W-0055: T-176-CONF-FRA-CT, p. 53, lines 11-12; W-0017: T-154-CONF-FRA-CT, p. 69, lines 9-10.

<sup>1300</sup> T-203-CONF-FRA-ET, p. 60, lines 3-25.

<sup>1301</sup> T-203-CONF-FRA-ET, p. 60, lines 19-25.

<sup>1302</sup> T-203-CONF-FRA-ET, p. 30, lines 18-22, and p. 81, lines 15-20. W-0116 stated [REDACTED] (T-209-CONF-FRA-ET, p. 33, line 24 to p. 34, line 15.)

<sup>1303</sup> T-171-CONF-FRA-CT, p. 3, lines 12-19, and p. 4, lines 4-5.

- The witness claimed that [REDACTED] staff members met with Mr Didier Mandey, Thomas Lubanga's Minister for Defence, during the second half of 2002.<sup>1304</sup> However, it has been demonstrated that Chief Kahwa held the post of Deputy Minister for Defence of the UPC,<sup>1305</sup> and that after his departure, no one replaced him.<sup>1306</sup> Mr Didier Mandey was never a member of the UPC executive and was not mentioned by any other witness.<sup>1307</sup>
- Firstly, he claimed not to know who was in power in Ituri in 2000<sup>1308</sup> and not to know the duties at the time of Wamba dia Wamba,<sup>1309</sup> Mbusa Nyamwisi,<sup>1310</sup> Thomas Lubanga<sup>1311</sup> and John Tibasima.<sup>1312</sup> However, an answer to a question put later by the Defence shows that the witness was manifestly abreast of the political situation in Ituri in 2000-2002.<sup>1313</sup>
- The witness claimed to have met Thomas Lubanga on more than 10 occasions between January and April 2001 [REDACTED].<sup>1314</sup> However, in his written statement, he claimed to have [REDACTED] and to have met with Mr Thomas Lubanga in April 2001.<sup>1315</sup>
- The witness claimed that between April 2001 and May 2002, on behalf of the UPC, young recruits were trained on the Kasenyi plain, located

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<sup>1304</sup> T-208-CONF-FRA-ET, p. 55, line 17, to p. 56, line 9 and lines 20-23.

<sup>1305</sup> EVD-OTP-00721.

<sup>1306</sup> EVD-OTP-00687.

<sup>1307</sup> EVD-OTP-00687; EVD-OTP-00721; EVD-D01-00051 and EVD-OTP-00385.

<sup>1308</sup> T-209-CONF-FRA-ET, p. 45, lines 9-15.

<sup>1309</sup> T-209-CONF-FRA-ET, p. 45, lines 18-20.

<sup>1310</sup> T-209-CONF-FRA-ET, p. 46, lines 1-4.

<sup>1311</sup> T-208-CONF-FRA-ET, p. 79, lines 4-6.

<sup>1312</sup> T-209-CONF-FRA-ET, p. 46, lines 7-8.

<sup>1313</sup> T-209-CONF-FRA-ET, p. 51, line 6, to p. 52, line 4.

<sup>1314</sup> T-209-CONF-FRA-ET, p. 56, lines 2-8.

<sup>1315</sup> T-209-CONF-FRA-ET, p. 60, lines 20-23, and p. 61, line 20, to p. 62, line 3.

on the road between Bunia and Mandro, at night by Rwandan soldiers who had been transported there by helicopter.<sup>1316</sup>

615. The witness stated that this assertion is “[TRANSLATION] absolutely plausible”, although:

- The Kasenyi plain is located between Bogoro and Kasenyi, near Lake Albert, whereas Mandro is located to the north-east of Bunia;<sup>1317</sup>
- It is implausible that Rwandan soldiers were transported by helicopter in the territory under the control of the Ugandan army;
- It is implausible that military training took place at night;
- The recruits would go to this training camp on foot every evening whereas Kasenyi plain is very far from Bunia.<sup>1318</sup>

616. Clearly, the reliability of Witness W-0116’s sources must be called into question.

617. Witness W-0116 had close ties with MONUC and the United Nations: (1) [REDACTED] by MONUC to work [REDACTED];<sup>1319</sup> and (2) the witness worked for [REDACTED] as from July 2002.

## **15. DRC-OTP-WWWW-0031 ([REDACTED])**

### **15.1 Credibility of the witness**

618. W-0031 acted as an intermediary for or had contact with Witnesses W-0007,<sup>1320</sup> W-0008,<sup>1321</sup> W-0011,<sup>1322</sup> W-0157,<sup>1323</sup> W-0293,<sup>1324</sup> W-0294,<sup>1325</sup> W-0298<sup>1326</sup> and W-

<sup>1316</sup> T-203-CONF-FRA-ET, p. 74, line 25, to p. 75, line 20.

<sup>1317</sup> See maps: EVD-D01-00342 and EVD-OTP-00399.

<sup>1318</sup> EVD-D01-00342.

<sup>1319</sup> T-203-CONF-FRA-ET, p. 94, lines 9-16.

<sup>1320</sup> W-0007: T-150-CONF-FRA-CT, p. 31, lines 8-11; W-0031: T-201-CONF-FRA-CT, p. 72, line 8; EVD-D01-01039, No. 23.

<sup>1321</sup> W-0007: T-138-CONF-FRA-CT, p. 10, line 25, to p. 11, line 5.; W-0031: T-201-CONF-FRA-CT, p. 72, lines 18-23; W-0031 emphasised that he was in close contact with W-0007 and W-0008 (T-201-CONF-FRA-CT, p. 73, line 19, to p. 74, line 10) and EVD-D01-01039, No. 23.

0299.<sup>1327</sup> He had links with W-0143, who introduced him to the Office of the Prosecutor,<sup>1328</sup> and he issued instructions to W-0321 both in his capacity as an intermediary for the organisation [REDACTED] and as an intermediary for the Office of the Prosecutor.<sup>1329</sup>

*- Intermediary W-0031 was acting on behalf of the Prosecutor*

619. It is not disputed that W-0031 was recruited as an intermediary by the Office of the Prosecutor in 2005 and that he continued to act as such at least until 2008.<sup>1330</sup>
620. During their collaboration, the Office of the Prosecutor made payments to W-0031 which the Defence has estimated to be at least \$23 000.<sup>1331</sup>
621. The accounting documents disclosed by the Office of the Prosecutor show that, from March 2007 onwards, W-0031 received a monthly allowance.<sup>1332</sup> As of 12 March 2010, he was still receiving accommodation and subsistence allowances from the Office of the Prosecutor.<sup>1333</sup>

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<sup>1322</sup> W-0011: T-142-CONF-FRA-CT, p. 11, lines 4-14; W-0031: T-201-CONF-FRA-CT, p. 74, lines 11-14, where W-0031 emphasised that he was in close contact with W-0011 and EVD-D01-01039, No. 23.

<sup>1323</sup> W-0157: T-188-CONF-FRA, p. 70, lines 20-25; W-0031: T-202-CONF-FRA-ET, p. 77, lines 11-14, and EVD-D01-01039, No. 23.

<sup>1324</sup> W-0293: T-153-CONF-FRA-CT, p. 53, lines 14-22, and EVD-D01-01039, No. 23.

<sup>1325</sup> W-0031: T-202-CONF-FRA-ET, p. 77, lines 1-2, and EVD-D01-01039, No. 23.

<sup>1326</sup> W-0031: T-202-CONF-FRA-ET, p. 74, lines 18-23.

<sup>1327</sup> EVD-D01-01039, No. 127.

<sup>1328</sup> EVD-D01-01039, No. 23.

<sup>1329</sup> T-308-CONF-FRA-ET, p. 30, line 11, to p. 31, line 16; p. 46, lines 12-15; p. 47, line 22, to p. 48, line 4; and p. 69, line 19, to p. 70, line 1.

<sup>1330</sup> EVD-D01-01039, No. 23.

<sup>1331</sup> The assessment was made on the basis of documents disclosed on 3 March 2010 and must be revised upwards. For example, the *Rapport de remboursement* EVD-D01-00988 showing that W-0031 received \$600 from 7 to 22 March 2010. See the 133 accounting documents: EVD-D01-00303, 00400-00401, 00403, 00410, 00483, 00485, 00506, 00517, 00523, 00525-00549, 00559, 00565-00572, 00576, 00600-00601, 00608, 00622, 00624-00629, 00631-00634, 00650-00657, 00659-00664, 00666-00669, 00766, 00814, 00834-00835, 00881-00888, 00933-00938, 00940-00945, 00953-00967, 00969-00972, 00974-00978, 00981-00984 and 00988-00991.

<sup>1332</sup> EVD-D01-00547; EVD-D01-00529 and EVD-D01-00403.

<sup>1333</sup> EVD-D01-00988.

622. These facts show that, for a long time, W-0031 played a central role as an intermediary.

*- The witnesses with whom he had dealings all provided manifestly mendacious statements*

623. Proof that the statements of the witnesses with whom W-0031 was in contact are mendacious has been set out in Part III above.

624. The fact that W-0031 was in contact with those witnesses who made manifestly mendacious statements strongly corroborates the Defence's argument that he encouraged many potential witnesses to give false testimony.

*- The Prosecutor possessed information that raised serious doubts about the reliability of W-0031*

625. As far back as 23 February 2006, the Office of the Prosecutor noted that W-0031's behaviour was raising serious doubts about his credibility and that collaboration with this intermediary should be suspended.<sup>1334</sup> This concern was conveyed to the members of the executive committee of the Office of the Prosecutor.<sup>1335</sup>

626. Witness Bernard Lavigne (W-0582) expressed his mistrust of W-0031<sup>1336</sup> and the limited credit he gave to his activities, whilst emphasising that W-0031 was insistent about playing a decisive role in the Office of the Prosecutor's investigations.<sup>1337</sup>

627. This situation should automatically have led the Office of the Prosecutor to stop using W-0031's services and to verify thoroughly the evidence he gathered.

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<sup>1334</sup> EVD-OTP-00641, p. 0527.

<sup>1335</sup> W-0582: Rule68Deposition-CONF-FRA-ET, 18-11-2010, p. 11, line 26, to p. 14, line 5, and EVD-OTP-00641.

<sup>1336</sup> Rule68Deposition-CONF-FRA-ET, 18-11-2010, p. 12, lines 1-15.

<sup>1337</sup> Rule68Deposition-CONF-FRA-ET, 18-11-2010, p. 13, lines 3-19.

628. However, developments in the trial and material disclosed to the Defence show that, far from adopting these elementary prudential measures, the Prosecutor continued to collaborate actively with W-0031, even going so far as to call him to appear as a prosecution witness.

*- W-0031 displayed clear bias against Thomas Lubanga and the UPC/RP*

629. W-0031, who formerly acted for the Prosecutor, demonstrated at trial a clear intention to testify against Mr Thomas Lubanga and the UPC/RP by making allegations which contradict the evidence in the case, or by adjusting his testimony to correspond to the charges confirmed against Mr Lubanga. This is illustrated by the following examples, amongst others:

- W-0031 alleged that it was the President of the UPC himself who sent commanders to find children in schools, in the street and at the market.<sup>1338</sup> However, this allegation is based on the fact that certain children who had come to his centre allegedly stated that they had been abducted by UPC commanders who had been sent by their leader, and that, since the workers at his centre could not know all the UPC leaders, they simply recorded the leader of the movement in their database.<sup>1339</sup>
- W-0031 claimed that, during a visit he paid to Mr Thomas Lubanga's residence, a child was beaten because he had not obeyed his commanders' orders and that, although he had not seen this child, he could ascertain from the sound of his voice that he was under the age of 15 years.<sup>1340</sup>
- W-0031 maintained that all the children appearing on a list prepared by MONUC and [REDACTED] were UPC soldiers, despite the fact that the document makes no mention of the armed group to which those children

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<sup>1338</sup> T-199-CONF-FRA-CT, p. 29, lines 12-16.

<sup>1339</sup> T-199-CONF-FRA-CT, p. 30, lines 3-12.

<sup>1340</sup> T-199-CONF-FRA-CT, p. 38, lines 10-19.

had allegedly belonged.<sup>1341</sup> He claimed that all of them had been enlisted by the UPC in Mongwalu in August 2002, and discharged by Jérôme Kakwavu on 1 April 2004 in Aru.<sup>1342</sup> However, such a situation is implausible, since the region of Mongwalu was under the control of the RCD-/KML until November 2002,<sup>1343</sup> and the UPC/RP lost control of the region of Aru in March 2003,<sup>1344</sup> which was also the time when Jérôme Kakwavu defected from the UPC/RP.<sup>1345</sup>

- W-0031 stated that he had personally visited the Rwampara camp between June and August 2003 when the camp was under the control of the UPC.<sup>1346</sup> However, the UPC/RP finally lost control of the Rwampara centre as from 6 March 2003.<sup>1347</sup>
- W-0031 stated that the individual to which exhibit EVD-OTP-00472 refers must have belonged to the UPC, despite the fact that this document makes no mention of the UPC or the FPLC, and that it is clear from W-0031's answers that he did not remember that individual specifically.<sup>1348</sup>
- W-0031 insisted on ascribing to the UPC all the entries left blank in the "armed group" column of exhibit EVD-OTP-00475,<sup>1349</sup> despite the fact that

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<sup>1341</sup> T-201-CONF-FRA-CT, p. 14, lines 10-19, and EVD-OTP-00474, p. 0519.

<sup>1342</sup> T-202-CONF-FRA-ET, p. 87, lines 1-11.

<sup>1343</sup> EVD-OTP-00710.

<sup>1344</sup> W-0055: T-178-CONF-FRA-CT, p. 34, lines 3-9.

<sup>1345</sup> W-0055: T-177-CONF-FRA-CT, p. 5, lines 7-19, and T-178-CONF-FRA-CT, p. 18, line 20, to p. 19, line 10. D01-0019: T-341-FRA-ET, p. 23, lines 18-28.

<sup>1346</sup> T-200-CONF-FRA-CT, p. 46, lines 3-6.

<sup>1347</sup> As from 6 March 2003, the date on which the UPDF drove out the UPC, the UPC was no longer present in the town of Bunia. T-341-FRA-ET, p. 22, lines 21-22 (D01-0019); T-178-CONF-FRA CT, p. 18, line 23 (W-0055).

<sup>1348</sup> T-200-CONF-FRA-CT, p. 88, lines 1-12.

<sup>1349</sup> T-201-CONF-FRA-CT, p. 20, line 21, to p. 23, line 21; T-203-CONF-FRA-ET, p. 5, line 19, to p. 7, line 19.

that document was prepared by [REDACTED] and MONUC<sup>1350</sup> and that the MONUC representative (W-0046) stated that this was not so.<sup>1351</sup>

- W-0031 stated that there was only one Hema militia in Ituri from 2000 to 2006, and that the militia was the UPC.<sup>1352</sup> W-0031 alleged that the UPC had an armed wing until at least December 2006,<sup>1353</sup> and that it continued to wage war on the outskirts of Bunia until 2006,<sup>1354</sup> in particular against the FARDC in Djugu and Irumu territories.<sup>1355</sup> Such a position is utterly implausible.

## 15.2 Unreliability of the information in the documentation from W-0031's centre

630. W-0031 acknowledged that certain children who came to the demobilization centres stated an age that was lower than their real age so that they could receive certain benefits granted to younger age brackets,<sup>1356</sup> and that certain children sought to register with more than one demobilization centre,<sup>1357</sup> sometimes under a different name.<sup>1358</sup> W-0031 confirmed that there were children who gave different names to different social workers with the intention of obtaining material benefits from the CTO [*Centre de transit et d'orientation* (Transit and Orientation Centre)], such as shelter, food or clothing.<sup>1359</sup> W-0031 stated that the children in the centres were given shelter, food, clothing, reintegration kits and other benefits, and some of their school fees were paid.<sup>1360</sup>

<sup>1350</sup> T-201-CONF-FRA-CT, p. 21, lines 13-14.

<sup>1351</sup> W-0046: T-206-CONF-FRA-ET, p. 29, lines 4-17.

<sup>1352</sup> T-202-CONF-FRA-ET, p. 63, line 21, to p. 64, lines 2 and 18-21.

<sup>1353</sup> T-202-CONF-FRA-ET, p. 62, lines 3-9.

<sup>1354</sup> T-202-CONF-FRA-ET, p. 8, line 23, to p. 9, line 1; p. 9, line 23, to p. 10, line 1.

<sup>1355</sup> T-202-CONF-FRA-ET, p. 59, line 16, to p. 60, line 19.

<sup>1356</sup> T-200-CONF-FRA-CT, p. 16, lines 17-25.

<sup>1357</sup> T-200-CONF-FRA-CT, p. 25, lines 5-9.

<sup>1358</sup> T-200-CONF-FRA-CT, p. 26, lines 1-6.

<sup>1359</sup> Testimony referenced: T-202-CONF-FRA-ET, p. 40, lines 8-15.

<sup>1360</sup> T-200-CONF-FRA-CT, p. 33, line 5, to p. 34, line 12.

631. Despite this situation, W-0031 stated on several occasions during his testimony that the workers at [REDACTED] did not carry out any checks whatsoever in relation to the allegations made by the children who reported to his centre, and that they prepared their files merely on the basis of what the children told them.<sup>1361</sup> Moreover, none of the documents originating [REDACTED] which were tendered into evidence indicate the children's exact date of birth, which shows that no genuine verification was carried out.
632. W-0031 stated that all verifications in relation to the age of the children were carried out by MONUC, [REDACTED], UNICEF and [REDACTED].<sup>1362</sup> MONUC was supposed to certify the dates and verify whether a child had in fact belonged to an armed group.<sup>1363</sup> However, the MONUC representative testified to the contrary, indicating that MONUC did not carry out any verification, and that it was the responsibility of their partners to do so.<sup>1364</sup>
633. W-0031's testimony on the subject of document EVD-OTP-00474 is a perfect illustration of the unreliability of the logbooks originating from the centre [REDACTED] ran. W-0031 testified that this exhibit testified to the age of the children in 2004.<sup>1365</sup> However, the document shows that W-0008 was 11 years old in 2004,<sup>1366</sup> whereas he would have in fact been 14 years old at that time.<sup>1367</sup> In the case of W-0007, the document indicates that he was 14 years old in 2004,<sup>1368</sup> whereas he would in fact have been almost 17 years old.<sup>1369</sup> Moreover, it is surprising that this document should state that W-0007 and W-0008 have

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<sup>1361</sup> T-202-CONF-FRA-ET, p. 47, lines 3-12; T-201-CONF-FRA-CT, p. 11, line 24, to p. 12, line 6.

<sup>1362</sup> T-199-CONF-FRA-CT, p. 21, lines 16-20, and T-201-CONF-FRA-CT, p. 19, line 20, to p. 20, line 1.

<sup>1363</sup> T-200-CONF-FRA-CT, p. 86, lines 4-6; T-199-CONF-FRA-CT, p. 23, lines 21-22; T-201-CONF-FRA-CT, p. 18, lines 5-16, and p. 19, lines 13-14.

<sup>1364</sup> W-0046: EVD-OTP-00493, T-38-FRA, p. 84, line 24, to p. 85, line 8, and T-206-CONF-FRA-ET, p. 10, lines 3-7.

<sup>1365</sup> T-200-CONF-FRA-CT, p. 92, lines 7-10, and T-201-CONF-FRA-CT, p. 63, lines 7-15.

<sup>1366</sup> EVD-OTP-00474, p. 0510, entry #1.

<sup>1367</sup> T-135-CONF-FRA-CT2, p. 4, line 22 (W-0008 stated that he was born on [REDACTED] 1989).

<sup>1368</sup> EVD-OTP-00474, p. 0510, entry #4.

<sup>1369</sup> T-148-CONF-FRA-CT, p. 17, line 23 (W-0007 stated that he was born on [REDACTED] 1987).

different ethnic origins, since W-0031 knew that these two individuals were brothers.<sup>1370</sup> W-0031 stated later in his testimony that, according to the information they obtained in their centre, W-0007 and W-0008 were children from the same family, but had different parents,<sup>1371</sup> whereas it was demonstrated that they did have the same father and mother.<sup>1372</sup>

### 15.3 Presence of children under the age of 15 years in the UPC/RP

634. W-0031 stated at various points in his testimony that he and the workers at [REDACTED] had seen children from 9 to 16 years of age who had left the UPC between 2000 and 2003, whilst indicating that they did not know where they came from.<sup>1373</sup> However, this was only the witness's own assessment on the basis of these individuals' physical appearance.<sup>1374</sup> Yet, an individual's real age cannot be established with certainty on the basis of his or her physical appearance alone, as W-0031 himself acknowledged.<sup>1375</sup>

635. Furthermore, W-0031 stated that, in his view, the concept of child soldier is broad enough to include, for example, a cook, a porter or a concubine.<sup>1376</sup>

### 15.4 The UPC's demobilization efforts

636. W-0031 stated that [REDACTED]'s partners had met with Mr Lubanga and Mr Adubango Biri around late 2002 or early 2003 in order to discuss demobilization.<sup>1377</sup> W-0031 stated that, after these meetings, Mr Adubango Biri, and his successor after he left, participated in [REDACTED] meetings as

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<sup>1370</sup> T-201-CONF-FRA-CT, p. 72, lines 18-19.

<sup>1371</sup> T-202-CONF-FRA-ET, p. 69, lines 10-17.

<sup>1372</sup> See *supra*, paras. 97-147.

<sup>1373</sup> T-199-CONF-FRA-CT, p. 7, line 20, to p. 8, line 3; T-200-CONF-FRA-CT, p. 42, line 20, to p. 43, line 10; T-201-CONF-FRA-CT, p. 68, lines 8-9.

<sup>1374</sup> T-201-CONF-FRA-CT, p. 65, lines 10-17.

<sup>1375</sup> T-200-CONF-FRA-CT, p. 17, lines 3-13.

<sup>1376</sup> T-199-CONF-FRA-CT, p. 20, lines 11-17.

<sup>1377</sup> T-199-CONF-FRA-CT, p. 46, line 4, to p. 47, line 1.

representatives of the organisation in power.<sup>1378</sup> He also acknowledged that the UPC and Save the Children jointly organised a seminar on the issue of child soldiers with UPC officers in Nyakasanza, that the seminar actually took place just before the UPC left in 2003,<sup>1379</sup> and that W-0031[REDACTED] received a report from Save the Children in this connection.<sup>1380</sup>

637. W-0031 stated that the demobilization of 68 children in June 2003 was merely a masquerade, since the 68 demobilized children “[TRANSLATION] rejoined armed groups”.<sup>1381</sup> However, W-0031 refused to answer the questions put to him about the specific information on which he based his assertion that this was a masquerade.<sup>1382</sup>

## 16. DRC-OTP-WWWW-0046 (KRISTINE PEDUTO)

### 16.1 Reliability of her testimony

#### *- Time spent in Ituri*

638. W-0046 did not travel much in Ituri during the period covered by the charges: (1) 72 hours between 1 January 2002 and late March 2003;<sup>1383</sup> (2) a mission from 25 February 2003 to 8 March 2003 to Uganda;<sup>1384</sup> (3) a fourteen-day mission to Ituri in late March 2003;<sup>1385</sup> and (4) staying in Ituri only as of late May 2003 until late 2004.<sup>1386</sup>

<sup>1378</sup> T-199-CONF-FRA-CT, p. 50, lines 6-16.

<sup>1379</sup> T-199-CONF-FRA-CT, p. 51, lines 15-19, and p. 52, lines 3-6 and lines 19-23.

<sup>1380</sup> T-199-CONF-FRA-CT, p. 51, lines 3-6.

<sup>1381</sup> T-200-CONF-FRA-CT, p. 35, lines 7-17.

<sup>1382</sup> T-203-CONF-FRA-ET, p. 11, line 16, to p. 14, line 6.

<sup>1383</sup> The witness's trip lasted barely 48 hours in early September 2002 and less than 24 hours around 10 September 2002 (EVD-OTP-00493, T-38-FR, p. 87, lines 14-21).

<sup>1384</sup> EVD-OTP-00479, T-37-FRA-ET, p. 29, lines 22-24.

<sup>1385</sup> EVD-OTP-00479, T-37-FRA-ET, p. 46, lines 15-24. T-208-CONF-FRA-ET, p. 21, line 25, to p. 22, line 1.

<sup>1386</sup> T-205-CONF-FRA-ET, p. 25, lines 7-10, and EVD-OTP-00479, T-37-FRA, p. 9, lines 11-13.

639. It follows that the witness had very poor first-hand knowledge of the events of which she spoke, having only been present in Bunia on a regular basis as from late May 2003.

*- Information source*

640. It can be seen from Witness W-0046's testimony that her knowledge of Ituri is poor<sup>1387</sup> and that she was never briefed on the situation in Ituri in July and August 2002. She received her first "specific briefings" on the situation in Ituri in September 2002, after she arrived in Bunia.<sup>1388</sup> Most of the information she had about the political and social situation in Ituri was communicated to her by MONUC.<sup>1389</sup>

641. However, the information provided to her by MONUC is itself completely unreliable:

- By way of example, the United Nations report of 18 October 2002<sup>1390</sup> prepared on the basis of information provided by MONUC stated that Lompondo fled Bunia on 10 July 2002, whereas those events took place one month later.<sup>1391</sup>
- In general, Expert Witness Prunier stressed the unreliability of the information which MONUC had about the factual details of the events which took place in Ituri between 2002 and 2003.<sup>1392</sup>

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<sup>1387</sup> Position held by Mr Molondo Lomondo, group to which he belonged (EVD-OTP-00493, T-38-FRA, p. 46, lines 18-21); an APC mutiny (EVD-OTP-00493, T-38-FRA, p. 54, lines 7-10); where Thomas Lubanga was in September 2002 (EVD-OTP-00493, T-38-FRA, p. 55, lines 6-12); FNI active in Ituri in September 2002 (EVD-OTP-00493, T-38-FRA, p. 60, line 18, to p. 67, line 7 and EVD-OTP-00479, T-37-FRA, p. 13, lines 7-22); Rwampara camp was under the UPC's control in July 2002 (EVD-OTP-00493, T-38-FRA, p. 95, lines 10-19, and p. 97, lines 13-23) whereas the UPC used Rwampara camp only after Mandro camp had closed. T-345-FRA-ET, p. 21, lines 3-4 (D01-0019), etc.

<sup>1388</sup> EVD-OTP-00493, T-38-FR, p. 47, lines 8-16.

<sup>1389</sup> For example: EVD-OTP-00493, T-38-FR, p. 102, lines 11-18.

<sup>1390</sup> EVD-OTP-00620, para. 15.

<sup>1391</sup> See, for example, EVD-OTP-00386. D01-0019: T-344-CONF-FRA-ET, p. 2, lines 19-26.

<sup>1392</sup> T-157-CONF-FRA-CT, p. 12, line 4, to p. 14, line 20.

*- Lack of verification*

642. The witness's testimony shows that she and her colleagues merely collected the statements of the children they met without subsequently carrying out any verification of those statements.<sup>1393</sup>
643. No further investigation was conducted, even where a major incident was mentioned, such as Thomas Lubanga having personally participated in the forcible abduction of a child.<sup>1394</sup>
644. Furthermore, she acknowledged that "[TRANSLATION] the point of the documentation [...] was not to be used in a testimony before a court of law", and that their priority was not to ascertain the veracity of the children's accounts, but to find solutions to their problems.<sup>1395</sup>

*- Bias of the witness*

645. Certain expressions used by the witness show obvious bias in favour of the prosecution. By way of example, she refers to the presence of "[TRANSLATION] very young children, whose Kalashnikovs were taller than they were".<sup>1396</sup> She repeated this expression during her testimony, whilst conceding, "[TRANSLATION] I'm sure the imagery was exaggerated, in a bid to reflect a reality which our sources wanted to convey".<sup>1397</sup>

## **16.2 Presence of child soldiers**

*- Investigations in September 2002*

646. The conditions under which the mission in early September took place did not allow the witness to collect reliable information. In particular, the witness confirmed that the mission was too hurried and that she therefore did not

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<sup>1393</sup> EVD-OTP-00493, T-38-FR p. 84, line 24, to p. 85, line 8; T-206-CONF-FRA-ET, p. 10, lines 3-7.

<sup>1394</sup> T-208-CONF-FRA-ET, p. 30, lines 2-20, and p. 32, lines 4-5.

<sup>1395</sup> T-208-CONF-FRA-ET, p. 30, lines 13-19.

<sup>1396</sup> EVD-OTP-00479, T-37-FRA, p. 23, lines 8-12.

<sup>1397</sup> EVD-OTP-00493, T-38-FRA, p. 64, line 17, to p. 65, line 12.

have an opportunity specifically to address in any depth the problem of children associated with armed groups.<sup>1398</sup>

647. Similarly, the witness had no personal knowledge of the meeting alleged to have taken place between General Martinelli of MONUC and the Accused. The witness was not present and did not read the minutes of the meeting.<sup>1399</sup>
648. In respect of her allegation concerning the child soldiers she saw guarding the UPC offices, the witness was unable to confirm with certainty that the children she saw were under the age of 15 years,<sup>1400</sup> or that they were in fact guarding offices belonging to the UPC/RP.<sup>1401</sup>

*- Irrelevance and unreliability of the investigations conducted in Rwampara in March 2003*

649. The witness stated that she interviewed minors<sup>1402</sup> in the Rwampara training camp in March 2003. However:
- At that time, the FPLC troops had been driven out of Bunia and Rwampara camp was under the control of Ugandan forces;<sup>1403</sup> therefore, the allegation that the minors she met belonged to the FPLC is unfounded or, at the very least, extremely questionable.<sup>1404</sup>

<sup>1398</sup> EVD-OTP-00479, T-37-FRA, p. 28, lines 14-16.

<sup>1399</sup> EVD-OTP-00479, T-37-FRA, p. 29, lines 13-17.

<sup>1400</sup> EVD-OTP-00479, T-37-FRA, p. 25, lines 4-11. EVD-OTP-00493, T-38-FRA, p. 70, line 19 to p. 71, line 5.

<sup>1401</sup> EVD-OTP-00493, T-38-FRA, p. 69, line 10, to p. 70, line 16.

<sup>1402</sup> According to the witness, of the 34 individuals she met, only 4 were under the age of 15 years. T-206-CONF-FRA-ET, p. 52, lines 7-11.

<sup>1403</sup> As from 6 March 2003, the date on which the UPDF drove out the UPC, the UPC was no longer present in the town of Bunia. T-341-FRA-ET, p. 22, lines 21-22 (D01-0019); T-178-CONF-FRA CT, p. 18, line 23 (W-0055).

<sup>1404</sup> EVD-OTP-00494, T-39-FRA, p. 28, line 1, to p. 29, line 13, and p. 72, lines 23-25.

- Those children were grouped together at the request of the Ugandan General Kale Kahiyura<sup>1405</sup> in circumstances which he refused to elucidate.<sup>1406</sup>
- The witness herself presented this initiative as a public relations exercise orchestrated by the UPDF so that MONUC would look with favour on the Ugandan army's initiatives in the DRC.<sup>1407</sup>
- Certain children whom she met on 25 March were no longer at the camp when she returned on 27 March, and the reasons given by General Kale did not seem credible to her.<sup>1408</sup>

650. The Defence was unable to conduct any investigations into the information collected by the witness. The report she prepared was withdrawn from the record of the case by the Chamber, since the identity of the minors interviewed was not disclosed.<sup>1409</sup>

*- Investigations in Uganda from 25 February to 8 March 2003*

651. Not only did the witness have no personal knowledge of the facts that had been reported to her, but these facts were also never verified by her team<sup>1410</sup> and are not corroborated by any evidence admitted into the record of the case.

*- Recruitment*

652. The witness merely reported an unverified rumour about Thomas Lubanga having allegedly called for the enlistment of children.<sup>1411</sup> This allegation is

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<sup>1405</sup> EVD-OTP-00494, T-39-FRA, p. 29, lines 11-16.

<sup>1406</sup> EVD-OTP-00494, T-39-FRA, p. 25, lines 5-10. The UPDF general who grouped the children together in Rwampara was unable to state the circumstances which led to those children being grouped there, despite MONUC's questions to him on the matter (who put them there, whether they were under arrest or were there voluntarily, and for how long they had been there).

<sup>1407</sup> EVD-OTP-00494, T-39-FRA, p. 30, lines 8-14.

<sup>1408</sup> EVD-OTP-00494, T-39-FRA, p. 54, line 14, to p. 55, line 2.

<sup>1409</sup> T-205-CONF-FRA-ET, p. 2, line 21, to p. 3, line 21.

<sup>1410</sup> EVD-OTP-00494, T-39-FRA, p. 15, lines 7-11.

<sup>1411</sup> EVD-OTP-00494, T-39-FRA, p. 66, line 20, to p. 67, line 2.

even less reliable because she referred to a period before September 2002,<sup>1412</sup> that is, a time when the Accused was away from Ituri.

### 16.3 Demobilization measures

*- Meeting of 30 May 2003*

653. The witness confirmed that the main topic of this meeting was the imminent arrival of the multinational force, Artemis.<sup>1413</sup> She confirmed that the issue of children was addressed at the end of the meeting, when they had risen (Mr Lubanga was in the process of escorting his visitors to the entrance to his residence).<sup>1414</sup>
654. She stated herself that such in-depth discussions are not held on the threshold.<sup>1415</sup>
655. She stated that, after the meeting, she did not personally attempt to contact Mr Lubanga.<sup>1416</sup>
656. Contrary to the Prosecutor's submission,<sup>1417</sup> Witness W-0046 stated having seen at Thomas Lubanga's residence only one child, whose age she estimated to be less than 15 years. It has been established that the circumstances in which she saw this child did not allow her to estimate his age accurately.<sup>1418</sup> Furthermore, she did not consider it important to discuss this with the Accused, in whose home she was at the time.<sup>1419</sup>

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<sup>1412</sup> EVD-OTP-00494, T-39-FRA, p. 68, lines 2-6.

<sup>1413</sup> T-209-CONF-FRA-ET, p. 6, lines 9-12.

<sup>1414</sup> T-209-CONF-FRA-ET, p. 6, lines 3-7.

<sup>1415</sup> EVD-OTP-00494, T-39-FRA, p. 84, lines 7-18.

<sup>1416</sup> T-209-CONF-FRA-ET, p. 6, line 14, to p. 7, line 22.

<sup>1417</sup> ICC-01/04-01/06-2748-Conf, para. 341.

<sup>1418</sup> EVD-OTP-00494, T-39-FRA, p. 79, line 14, to p. 82, line 20.

<sup>1419</sup> EVD-OTP-00494, T-39-FRA, p. 82, line 23, to p. 83, line 3.

*- Demobilization measures*

657. Contradicting her assertion that the demobilization measures were merely a “[TRANSLATION] masquerade”, the witness confirmed that 15 days or three weeks later, a child protection NGO informed her that one of the UPC commanders had contacted it about taking charge of some of the children. He was allegedly told to route his request through the institutions of the interim administration that had been established to deal with demobilization matters. The witness knew that some of the children who had left the ranks of the UPC subsequently went to particular transit centres.<sup>1420</sup>
658. The witness acknowledged that she was labelling the demobilization measures as a “masquerade” chiefly because the demobilization process had to be planned and simply releasing the children was not enough to be considered demobilization.<sup>1421</sup>
659. She also conceded that she was unaware of internal documents of the UPC/RP and the FPLC concerning these demobilization measures.<sup>1422</sup>
660. Furthermore, the witness confirmed that an NGO had indeed undertaken the demobilization of minors within the framework of the measures taken by the UPCP/RP.<sup>1423</sup>

**16.4 MONUC’s failure to protect civilian populations**

661. The witness confirmed that neither MONUC nor the interim administration assisted the Hema civilian population when it was being massacred,<sup>1424</sup> although MONUC had military resources which would have enabled it to protect people effectively.<sup>1425</sup>

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<sup>1420</sup> T-206-CONF-FRA-ET, p. 56, line 22, to p. 57, line 15.

<sup>1421</sup> EVD-OTP-00494, T-39-FRA, p. 88, lines 11-22.

<sup>1422</sup> For example: EVD-OTP-00691, EVD-OTP-00494, T-39-FRA, p. 88, line 8.

<sup>1423</sup> T-206-CONF-FRA-ET, p. 57, lines 4-12.

<sup>1424</sup> T-208-CONF-FRA-ET, p. 7, lines 4-16.

<sup>1425</sup> T-208-CONF-FRA-ET, p. 2, line 19, to p. 3, line 6.

## 16.5 Material and financial benefits received by the beneficiaries of the demobilization programmes

662. The witness confirmed that the children who were declared child soldiers at transit and orientation centres (CTOs) [*Centre de Transit et d'Orientation*] could receive assistance from them,<sup>1426</sup> including accommodation, food, clothing, payment of school fees, reintegration measures, medical care and various training courses.<sup>1427</sup> She also stated that the children received a “demobilization kit” consisting of “[TRANSLATION] several sets of clothing, basic hygiene supplies, one or two blankets, a cooking kit, perhaps and fairly basic things, shoes, some exercise books, pencils”.<sup>1428</sup>
663. Witnesses W-0008,<sup>1429</sup> W-0294<sup>1430</sup> and W-0213<sup>1431</sup> confirmed that they had received financial and material benefits when they went to transit centres. Witness D01-0005 also stated that these benefits prompted her and her friends to go to CTOs.<sup>1432</sup>

## 17. DRC-OTP-WWWW-0360 (EXPERT WITNESS PRUNIER)

### 17.1 Reliability of the expert opinion

664. The expert acknowledged that he did not have sufficient information about the issue of child soldiers in Ituri to be able to make any useful statement on the matter.<sup>1433</sup> Accordingly, the assertions he made in his report on this subject should be set aside on the grounds that they are unreliable.<sup>1434</sup>

<sup>1426</sup> T-208-CONF-FRA-ET, p. 14, lines 3-15.

<sup>1427</sup> T-208-CONF-FRA-ET, p. 14, line 21, to p. 15, line 5, and p. 16, lines 17-25, and p. 17, lines 14-23.

<sup>1428</sup> T-208-CONF-FRA-ET, p. 19, line 20 to p. 20, line 1.

<sup>1429</sup> T-138-CONF-FRA-CT, p. 18, lines 15-18.

<sup>1430</sup> T-152-CONF-FRA-CT, p. 31, lines 15-16; p. 38, lines 14-16; p. 39, lines 6-9; and p. 45, lines 4-6 and 21-24.

<sup>1431</sup> T-133-CONF-FRA-CT, p. 34, lines 20-21, and p. 35, lines 2-20.

<sup>1432</sup> T-261-CONF-FRA-CT, p. 26, line 13, to p. 29, line 15.

<sup>1433</sup> T-157-CONF-FRA-CT, p. 33, line 18 and line 25, to p. 34, line 1 and lines 12-15.

<sup>1434</sup> EVD-D01-00075 (French version) and EVD-OTP-00403 (English version).

665. Furthermore, the expert's testimony reveals that the assertions in his report pertaining precisely to Thomas Lubanga or the UPC are frequently inaccurate or, at the very least, unreliable in the absence of known or verified sources.<sup>1435</sup> Generally, the expert emphasised the lack of reliability of the information in his possession, which was also in MONUC's possession, concerning the factual details of the events which occurred in Ituri from 2002 to 2003.<sup>1436</sup>
666. Finally, the expert's testimony reveals that some of the statements in his report are manifestly tainted by bias against Thomas Lubanga, the UPC or the Hema community. This bias is apparent in his analysis of the origin of the ethnic conflict in Ituri,<sup>1437</sup> in the positions ascribed to Thomas Lubanga,<sup>1438</sup> and in the crimes committed in Ituri being wrongfully ascribed to the UPC<sup>1439</sup> or the Hema community.<sup>1440</sup>
667. However, the expert witness provided useful clarifications on certain general subjects, which are set out below.

## 17.2 Nature of the conflict

668. It can be established on the basis of the expert's testimony that, during 2002 and until late May 2003, Ituri was the theatre of an international armed conflict between the Governments of the Congo (DRC), Uganda and Rwanda, which clashed either directly or through armed groups which they created or supported.
669. He described the pivotal role of Uganda, an occupying force as from the beginning of the turmoil until late May 2003,<sup>1441</sup> which instigated the creation

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<sup>1435</sup> For example, on the origin of the ethnic conflict: T-156-FRA-CT, p. 30, lines 2-23; and on the position of the "Hema leaders": T-156-FRA-CT, p. 77, lines 8-17.

<sup>1436</sup> T-157-CONF-FRA-CT, p. 12, line 4, to p. 14, line 20.

<sup>1437</sup> T-156-FRA-CT, p. 38, lines 3 *et seq.*

<sup>1438</sup> T-156-FRA-CT, p. 88, lines 10-17.

<sup>1439</sup> T-157-CONF-FRA-CT, p. 11, line 22, to p. 13, line 23, and p. 28, line 24, to p. 29, line 19.

<sup>1440</sup> T-157-CONF-FRA-CT, p. 17, line 3, to p. 18, line 8.

<sup>1441</sup> T-156-FRA-CT, p. 40 lines 19-25.

in late 2002 and early 2003 of armed groups which it supported financially and militarily.

670. Accordingly, the expert witness spoke of the Ugandan Government's manipulation, firstly of RCD-K/ML and its army, the APC,<sup>1442</sup> and subsequently, after that movement swore allegiance to the Kinshasa Government,<sup>1443</sup> of numerous armed groups created in Uganda (PUSIC, FPDC, FAPC, FNI, FRPI, etc.).<sup>1444</sup>
671. He confirmed the involvement of the Kinshasa Government either directly or through Mbusa Nyamwisi's RCD-K/ML and its army, the APC,<sup>1445</sup> whose troops consisted primarily of soldiers from the Nande and Lendu communities.<sup>1446</sup>
672. Finally, he confirmed the involvement of Rwanda.<sup>1447</sup>
673. The expert thus described a "[TRANSLATION] war by intermediary" or a "war by proxy" between the States of the Congo (DRC), Uganda and Rwanda – a war which continued "[TRANSLATION] until the final evacuation of the Ugandan troops".<sup>1448</sup> These circumstances establish the existence in Ituri of an international armed conflict during 2002 and until late May 2003.

### **17.3 Security situation in Ituri**

674. The expert confirmed the spread of acts of extreme violence against the Hema civilian population<sup>1449</sup> and stressed that, in this context, "[TRANSLATION] the least dangerous place was to be an armed militia member. Anybody carrying

<sup>1442</sup> T-156-FRA-CT, p. 48, lines 19-21, and p. 54, lines 7-9.

<sup>1443</sup> T-156-FRA-CT, p. 50, lines 11-16.

<sup>1444</sup> T-156-FRA-CT, PUSIC: p. 69, lines 17-23; FPDC: p. 69, line 25, to p. 70, line 10; FAPC: p. 70, lines 12-24; FNI: p. 70, line 25, to p. 71, line 3.

<sup>1445</sup> T-156-FRA-CT, p. 61, lines 12-16, and p. 65, lines 9-24.

<sup>1446</sup> T-156-FRA-CT, p. 51, lines 14-21.

<sup>1447</sup> T-156-FRA-CT, p. 73, lines 2-4.

<sup>1448</sup> T-156-FRA-CT, p. 65, line 9, to p. 66, line 5.

<sup>1449</sup> T-156-FRA-CT, p. 40, lines 7-15; p. 41, lines 10-14 and line 20, to p. 42, line 7.

a weapon incurred the least risk. There were few deaths among the fighters. Most of the dead were civilians".<sup>1450</sup> Such a situation explains the huge wave of voluntary enlistments into the armed groups during that period.

#### **17.4 Attitude of the United Nations, and MONUC in particular**

675. The expert confirmed that MONUC did not intervene effectively in order to protect the civilian population during the period of turmoil.<sup>1451</sup> This inaction provides further insight into why some of the victims of the turmoil chose to seek protection within armed groups.
676. He confirmed that, despite the information it had about Uganda's prime responsibility for the pillaging and massacres which took place in Ituri, the United Nations deliberately chose to support the Ugandan authorities and to entrust them with "[TRANSLATION] performing security functions impartially" in Ituri until they left in late May 2003.<sup>1452</sup> This United Nations bias in favour of Uganda provides further insight into MONUC's hostility towards Thomas Lubanga and the UPC, who always vigorously condemned Uganda's conduct and called for the Ugandan troops' withdrawal from Ituri.<sup>1453</sup>
677. Finally, the expert witness confirmed the bias of MONUC reports between 2002 and 2003, emphasising that, when faced with uncertain information, "[TRANSLATION] in the case of MONUC reports, a choice could be made on this basis: 'at this point in time it would be counter-productive to say one thing rather than another'. [...] Some truths are better left unspoken".<sup>1454</sup> The expert witness related an anecdote claiming that a MONUC official had told him,

<sup>1450</sup> T-156-FRA-CT, p. 42, lines 9-12.

<sup>1451</sup> T-156-FRA-CT, p. 46, lines 15-22.

<sup>1452</sup> T-156-FRA-CT, p. 81, line 21, to p. 82, line 8, and p.84, line 9, to p. 85, line 1.

<sup>1453</sup> On relations between Thomas Lubanga and Uganda: Thomas Lubanga's two arrests by Uganda: T-156-FRA-CT, p. 75, line 17, to p. 76, line 4; on the departure of Ugandan troops: T-156-FRA-CT, p. 76, lines 5-8. See also EVD-D01-00076.

<sup>1454</sup> T-157-CONF-FRA-CT, p. 20, lines 9-14.

with reference to the UPC, “[TRANSLATION] their nickname is Al-Qaeda 2”.<sup>1455</sup> This blatant hostility on the part of MONUC towards the Accused provides further insight into the UN’s role in the initiation of the proceedings against Thomas Lubanga and its reticence about allowing access to the exculpatory evidence contained in its archives.

### 17.5 The UPC’s political strategy

678. The expert confirmed that, in late 2002, one of the UPC’s primary concerns was to become one of the main players in the “[TRANSLATION] global, inclusive Intercongolèse Dialogue”.<sup>1456</sup> He also acknowledged that, during these discussions on power-sharing in the DRC, the political and military power – whether real or imagined – exercised over a territory was a determining factor.<sup>1457</sup> He noted that, in the implementation of these political strategies, the political leaders could be led to make public statements which did not necessarily reflect the reality of the circumstances.<sup>1458</sup>

### III. WITNESSES CALLED BY THE PARTICIPATING VICTIMS (A/0270/07, A/0225/06 AND A/0229/06)

679. The Defence refers to the observations it presented in its “Defence Application Seeking a Permanent Stay of the Proceedings”<sup>1459</sup> and the “*Réplique de la Défense aux ‘Observations du représentant légal des victimes a/0225/06, a/0229/06 et a/0270/07 sur la requête de la Défense aux fins d’arrêt définitif du procès’*”.<sup>1460</sup>

680. Furthermore, the Defence emphasises that, on numerous occasions, the Legal Representatives rely on statements and documents which were at no point admitted into evidence, and on occasion were even expressly excluded.

<sup>1455</sup> T-157-CONF-FRA-CT, p. 30, lines 11-19.

<sup>1456</sup> T-156-FRA-CT, p. 91, line 16, to p. 92, line 8. See also: EVD-D01-00078.

<sup>1457</sup> T-156-FRA-CT, p. 52, lines 18-21.

<sup>1458</sup> T-156-FRA-CT, p. 90, line 19, to p. 91, line 7, and p. 92, lines 2-8.

<sup>1459</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 200-228.

<sup>1460</sup> ICC-01/04-01/06-2686-Conf.

## **PART IV: ELEMENTS OF CRIMES**

### **I. Existence and nature of the armed conflict**

#### **1. Existence of an international armed conflict until late May 2003**

681. The facts on which the Pre-Trial Chamber relied in order to establish the existence of an international armed conflict between September 2002 and late May 2003 have been confirmed by the evidence presented at trial.
682. In particular, Expert Witness Prunier (W-0360) confirmed that, during 2002 and until late May 2003, Ituri was the theatre of an international armed conflict between the Governments of the Congo (DRC), Uganda and Rwanda, which clashed either directly or through armed groups which they created or supported.
683. He described the pivotal role of Uganda, an occupying force as from the beginning of the turmoil<sup>1461</sup> until late May 2003,<sup>1462</sup> which instigated the creation in late 2002 and early 2003 of armed groups which it supported financially and militarily.
684. Thus, the expert witness explained the Ugandan Government's manipulation, firstly of RCD-K/ML and its army, the APC,<sup>1463</sup> and subsequently, after that movement swore allegiance to the Kinshasa Government,<sup>1464</sup> of numerous armed groups created in Uganda (PUSIC, FPDC, FAPC, FNI, FRPI, etc.).<sup>1465</sup>

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<sup>1461</sup> T-156-FRA-CT, p. 40, lines 16-25.

<sup>1462</sup> Citing the report: T-157-CONF-FRA-CT, p. 3, lines 8-11.

<sup>1463</sup> T-156-FRA-CT, p. 48, lines 19-21, and p. 54, lines 7-9.

<sup>1464</sup> T-156-FRA-CT, p. 50, lines 11-16.

<sup>1465</sup> T-156-FRA-CT, PUSIC: p. 69, lines 17-23; FPDC: p. 69, line 25, to p. 70, line 10; FAPC: p. 70, line 14; FNI: p. 70, line 25, to p. 71, line 3.

685. He confirmed the involvement of the Kinshasa Government either directly or through Mbusa Nyamwisi's RCD-K/ML and its army, the APC,<sup>1466</sup> whose troops consisted primarily of soldiers from the Nande and Lendu communities.<sup>1467</sup>
686. Finally, he confirmed the involvement of Rwanda.<sup>1468</sup>
687. The expert thus described a "[TRANSLATION] war by intermediary" or a "[TRANSLATION] war by proxy" between the States of the Congo (DRC), Uganda and Rwanda – a war which continued "[TRANSLATION] until the final evacuation of the Ugandan troops".<sup>1469</sup> These circumstances characterise the existence in Ituri of an international armed conflict during 2002 and until late May 2003.
688. Witnesses W-0360,<sup>1470</sup> W-0055<sup>1471</sup> and W-0017<sup>1472</sup> confirmed the significant involvement of Uganda as an occupying force. Witnesses W-0017<sup>1473</sup> and W-0360<sup>1474</sup> confirmed Rwanda's involvement. Witness W-0360<sup>1475</sup> confirmed the involvement of the Kinshasa Government.
689. As the Pre-Trial Chamber rightly found, the armed conflict waged in Ituri between September 2002 and June 2003 was therefore a conflict of an international character.

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<sup>1466</sup> T-156-FRA-CT, p. 61, lines 12-16, and p. 65, lines 9-24.

<sup>1467</sup> T-156-FRA-CT, p. 51, lines 14-21.

<sup>1468</sup> T-156-FRA-CT, p. 73, lines 2-4.

<sup>1469</sup> T-156-FRA-CT, p. 65, line 9, to p. 66, line 5.

<sup>1470</sup> T-156-FRA-CT, p. 40, lines 16-25.

<sup>1471</sup> T-174-CONF-FRA-CT, p. 25, lines 11-12.

<sup>1472</sup> T-154-CONF-FRA-CT, p. 66, lines 7-20.

<sup>1473</sup> T-154-CONF-FRA-CT, p. 38, line 22, and p. 59, lines 4-11, and T-158-CONF-FRA-CT, p. 32, lines 1-13.

<sup>1474</sup> T-156-FRA-CT, p. 73, lines 2-4.

<sup>1475</sup> T-156-FRA-CT, p. 61, lines 12-16, and p. 65, lines 9-24.

690. However, article 8(2)(b)(xxvi) pertains solely to “[c]onscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities” [emphasis added].
691. It is undisputed that the FPLC never constituted “national armed forces”. Accordingly, the crime described in article 8(2)(b)(xxvi) cannot be established in the present case.
692. Article 8(2)(e)(vii) pertains exclusively to “[c]onscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” in the context of an armed conflict not of an international character.
693. In the present case, the armed conflict found to have existed in Ituri within the period of the charges, between September 2002 and late May 2003, was an international armed conflict. It follows that the crime described in article 8(2)(e)(vii) cannot be established here.

## **2. Absence of armed conflict from late May 2003 onwards**

694. Contrary to the Prosecutor’s submission, no evidence has been brought to establish the existence of an armed conflict, whether international or non-international, between late May 2003 and 13 August 2003.
695. During that period, even though sporadic acts of great violence occurred in Ituri, they were not the result of military operations conducted by “organised armed groups” exerting control over a part of the territory of the DRC. Such violent acts were perpetrated by individuals or groups of individuals who do not constitute “organised armed groups” within the meaning of IHL. They are characteristic of a situation of “internal disturbances and tensions”, which does not correspond to the definition of armed conflict under international law, and falls outside the jurisdiction of the International Criminal Court.

696. No evidence has been presented with a view to demonstrating that the individuals claiming to have adhered to movements known as the FNI, PUSIC or FRPI acted within the framework of “organised armed groups” within the meaning of the statutory provisions.
697. There is no evidence to establish that, during that period, the FPLC participated in military operations against other organised armed forces under the leadership of a responsible command exercising control over a part of the territory of the Congo. Moreover, the FPLC no longer exercised any territorial control during that period, since Ituri was under the control of the multinational force, Artemis, from 6 June 2003 onwards.<sup>1476</sup>
698. Accordingly, no international or non-international armed conflict can be said to have existed between late May 2003 and 13 August 2003, the end date of the period of the charges.
699. It follows that none of the crimes described in article 8 can be established for that period.

## **II. Enlistment of children under the age of 15 years into the FPLC**

700. None of the evidence presented at trial proves beyond reasonable doubt that children under the age of 15 years were integrated into the FPLC during the period of the charges to conduct military activities.
701. The vague and nebulous claim, often made by Prosecution witnesses and frequently echoed by the Prosecutor in his brief, that the FPLC had in its midst “young recruits” or *kadogos* is irrelevant for assessing the material elements of the crime under articles 8(2)(b)(xxvi) and 8(2)(e)(vii), which require proof that the children were under the age of 15 years.

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<sup>1476</sup> D01-0019: T-345-FRA-ET, p. 44, line 28. D01-0011: T-348-FRA-ET, p. 4, line 17, to p. 5, line 2.

702. An assessment of the various evidentiary materials presented by the Prosecutor shows that such proof beyond reasonable doubt has not been provided.

### 1. Video footage

703. The Prosecutor relies on various video excerpts which, in his view, provide proof of the presence within the FPLC of recruits “visibly” under the age of 15 years. He presents these video excerpts as being evidence “of particular significance”.<sup>1477</sup>

704. Whilst it is possible to accept that an individual can be placed approximately within a particular age bracket (early childhood, adolescence, maturity, old age), it is nevertheless impossible to determine accurately a person’s age solely by looking at a photograph of the person, or even to place that person within an age bracket by distinguishing the person from older or younger individuals in the same age bracket.<sup>1478</sup> This difficulty is increased substantially in the case of growing adolescents, whose physical appearance depends on numerous factors – primarily diet<sup>1479</sup> – and is further aggravated by aspects specific to each community. The difficulty becomes insurmountable when the observer is unacquainted with the community from which the child originates. Hence, it is impossible to distinguish with sufficient certainty a 12- or 13-year-old child from a 15- or 16-year-old child solely on the basis of a photograph or video excerpt.

705. Nonetheless, in order to contemplate a conviction, criminal proceedings require that each element of the crime be proved beyond reasonable doubt.

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<sup>1477</sup> ICC-01/04-01/06-2748-Conf, para. 164.

<sup>1478</sup> W-0031 confirmed that an individual’s physical appearance alone is insufficient to determine his or her age: T-200-CONF-FRA-CT, p. 17, lines 3-13.

<sup>1479</sup> W-0041: T-126-CONF-FRA-CT, p. 55, lines 14-20, and W-0359: T-172-CONF-FRA-CT, p. 37, lines 13-18.

706. In the present case, the video excerpts on which the Prosecutor seeks to rely show individuals belonging to the same age bracket: adolescence, an age bracket with indistinct limits which vary according to the individual, within which it is impossible to distinguish ages with sufficient certainty. This age bracket, approximately between 13 and 17 years of age, corresponds to the *kadogo* concept in use in the Great Lakes region of Africa.
707. It follows that these video excerpts do not make it possible to establish beyond reasonable doubt that the adolescents appearing therein were under the age of 15 years.

## 2. Documents

708. None of the documents on which the Prosecutor relies proves beyond reasonable doubt that children under the age of 15 years were enlisted into the FPLC.

### 2.1 Logbooks on which Witness W-0031 commented<sup>1480</sup>

709. The Prosecutor submits that the logbooks EVD-OTP-00739 and EVD-OTP-00476 shed light on the number of children under the age of 15 years in the UPC/FPLC, and that they demonstrate the systematic nature of the plan to conscript, enlist and use children in the UPC/FPLC.
710. The unreliability of these exhibits and of the information they contain precludes any conclusions from being drawn beyond reasonable doubt.
711. Firstly, those documents were tendered into evidence during the testimony of W-0031. However, it has been shown that Witness W-0031, acting as an intermediary of the Office of the Prosecutor, personally participated in concerted initiatives to tamper with evidence with the intent of securing the

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<sup>1480</sup> EVD-OTP-00739, logbook entitled “[TRANSLATION] CAAFAGs reintegrated” and EVD-OTP-00476, logbook of admissions to a CTO.

Accused's conviction.<sup>1481</sup> This casts extremely serious doubt on the provenance of these exhibits, their use by Witness W-0031 and the comments he made about them. As shown previously, the information provided by the organisations linked to this witness and his own statements cannot be considered to be sufficiently reliable.

712. Secondly, the evidence brought to light a widespread practice whereby for material gain, individuals would report to demobilization centres and lie about their age and about having belonged to an armed group. Accordingly, irrespective of the reliability of the persons who collected the information contained in these logbooks, the reliability of the information itself is therefore highly questionable.

713. This information was not verified:

714. In respect of exhibit EVD-OTP-00476, W-0031 stated that it was CONADER (*Commission nationale pour le désarmement, la démobilisation et la réinsertion* [National Commission for Disarmament, Demobilization and Reintegration]) which was supposed to verify that the individuals listed had belonged to an armed group. However, as it emerged from the testimony of D01-0023 and W-0089, CONADER merely noted the information provided by the individuals presenting themselves as former soldiers, and did not carry out any verification whatsoever.<sup>1482</sup> These two witnesses also testified to the widespread practice of civilians posing as former soldiers for the purpose of receiving financial assistance.<sup>1483</sup> W-0031 added that the age recorded in the logbook was the age provided by the individuals themselves when they arrived at the centre.<sup>1484</sup> The fact that the "Age/sex" column does not contain any exact date of birth confirms that the age provided by those individuals

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<sup>1481</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 184-199.

<sup>1482</sup> See *supra*, paras. 510-522.

<sup>1483</sup> See *supra*, paras. 510-522.

<sup>1484</sup> T-201-CONF-FRA-CT, p. 35, lines 2-12.

was not subject to any verification. W-0031 stated that the logbook refers to the concept of "EDA" (*enfants démobilisés dans l'armée* [children demobilized from the army]), a term which was later replaced by "EAFGA"<sup>1485</sup> [children associated with armed forces and armed groups], a concept encompassing indiscriminately both children assigned to military tasks, on the one hand, and on the other, those driven by a variety of circumstances to join armed groups, but who were not actually treated as soldiers.<sup>1486</sup>

715. Finally, it cannot be concluded on the basis of document EVD-OTP-00739 that children under the age of 15 years were present within the ranks of the FPLC, since it contains no reference whatsoever to that armed group, or to the UPC/RP. Although the title of the exhibit is "*Les EAFGA réintégrés*" [reintegrated children associated with armed forces and armed groups], no details are provided as to the relationship those individuals may have had to the armed groups. Furthermore, the document does not state the individuals' date of birth, only their age, which shows that no genuine verification was conducted in this regard.

716. The unreliability of the logbooks originating from the centre [REDACTED] was also clearly shown in paragraphs 618 to 637 *supra*.

## **2.2 "Rapport mensuel du bureau 5" [monthly report of Bureau 5], dated 6 November 2002<sup>1487</sup>**

717. The Prosecutor claims that this report and an excerpt from the testimony of W-0038<sup>1488</sup> prove that Eric Mbabazi, the G5 in the FPLC, oversaw the awareness-raising campaigns intended to persuade villagers to send their children for training. This claim is unfounded.

<sup>1485</sup> T-201-CONF-FRA-CT, p. 32, lines 19-25.

<sup>1486</sup> See *supra*, paras. 618-637.

<sup>1487</sup> EVD-OTP-00457.

<sup>1488</sup> ICC-01/04-01/06-2748-Conf, para. 181. It must be emphasised that, contrary to the Prosecutor's submission at footnote 363 of his brief, W-0038 did not make reference to Éric Mbabazi during his testimony, but to an individual named Lobo: T-114-CONF-FRA-CT, p. 27, lines 2-11.

718. Firstly, contrary to the Prosecutor's submission, this document contains no reference to an FPLC awareness-raising campaign aimed at encouraging recruitment from villages.
719. Secondly, as shown above, the use of the term "children" in the context of this report refers to soldiers in general and not to minors.<sup>1489</sup> The Prosecutor's position that the expression "children" used in this report is defined in opposition to the concept of "adults" and therefore refers to minors is completely contradicted by the overall meaning of the sentences in which it appears:<sup>1490</sup> if this interpretation were to be upheld, it would lead to the conclusion that the FPLC recruited only minors, to the exclusion of any adults. Witness W-0019 confirmed that the reference to "children" at page 0137 of document EVD-OTP-00457 encompasses the FPLC soldiers in general.<sup>1491</sup>
720. This document is therefore irrelevant to an assessment of the potential presence of children under the age of 15 years in the FPLC.

### **2.3 Logbook of radio communications<sup>1492</sup>**

721. The Prosecutor relies on this exhibit to submit that the victims of the fighting, including children wounded or killed, were recorded in a logbook maintained by the UPC/FPLC.<sup>1493</sup> However, this exhibit in no way constitutes a record of individuals wounded or killed in combat; instead, it appears to be a log of radio communications between various FPLC officers.

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<sup>1489</sup> D01-0019: T-346-FRA-ET, p. 14, line 24, to p. 18, line 19.

<sup>1490</sup> EVD-OTP-00457, pp. 0137 and 0141 "[TRANSLATION] Often when picking up recruits in some village or other, try to find a way to send back a quarter (1/4) of these children to fill the gap, because they are the ones who provide security to people in the bush. The population has purportedly stated that it will no longer send children, since it feels totally unsafe" [emphasis added].

<sup>1491</sup> T-346-FRA-ET, p. 14, line 20, to p. 16, line 12.

<sup>1492</sup> EVD-OTP-00409 (and its [French] translation, EVD-OTP-00622).

<sup>1493</sup> ICC-01/04-01/06-2748-Conf, para. 216.

722. Furthermore, a study of the various occurrences of the word “child” in this log<sup>1494</sup> confirms that the term is used as a synonym of “soldier”, and does not refer to minors. The following excerpts demonstrate this unequivocally:

- Entry DRC.00017.048 (p. 0942 of the [French] translation): “[TRANSLATION] After being ambushed, the children of Nyangarayi took 5 enemies, but they had no weapons except for arrows and their medicines (-) We didn’t succeed in entering Nyangarayi because the troops are few, if we receive reinforcements, we will advance to the target (-) situation to follow” [emphasis added].
- Entry DRC.00017.071 (p. 0965 of the translation): “[TRANSLATION] Fataki – the children hit the target” [emphasis added].
- Entry DRC.00017.124 (p. 1018 of the translation): “[TRANSLATION] I think that CO Kisémbó doesn’t deserve to remain CO, he’s lowering the morale of the children, when I arrived he intended to go off to Fataki (-) he left *amee* all alone and then his 2<sup>nd</sup> CO 11 BN refused (-) he told him that he had not yet received the order to leave here and I think that he should rest first (-) plus, the troops remaining here are 156 men (-) plus two invalids and two in jail, so 160 in total (-)(-)” [emphasis added].
- Entry DRC.00017.210 (p. 1104 of the translation): “[TRANSLATION] Given the good work the children have done in Mahagi region (-) anything they need they will have and we are envisaging sending them a force with materiel (-) the Chief of General Staff commander Kisémbó has headed for a place in commander Mugisha’s area to take delivery of the materiel, he will be coming by aeroplane, expect him in about two days (-)(-)” [emphasis added].

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<sup>1494</sup> EVD-OTP-00409 (translation: EVD-OTP-00622).

723. The meaning of the word “children” in a military context is perfectly illustrated by video footage presented by the Prosecutor himself, in an excerpt showing the Governor of Ituri paying tribute to the FPLC soldiers:<sup>1495</sup>

[TRANSLATION] Our march today shows the support we provide to our children here, I quote: “the patriotic force for the liberation of the Congo”. I congratulate them today [emphasis added].

724. As Witness D01-0019 confirmed,<sup>1496</sup> there is no doubt that the Governor is referring to the soldiers of the FPLC as a whole, and not only to soldiers who were minors. Accordingly, references to “children” must be considered in context in order to assess their precise meaning.<sup>1497</sup>

#### **2.4 United Nations reports**

725. The Prosecutor submits that documents EVD-OTP-00623 (report of the United Nations Secretary-General on the events in Ituri from January 2002 to December 2003), EVD-OTP-00480 (United Nations report of 20 June on investigations in Ituri), and EVD-OTP-00737 (draft MONUC child protection report of February 2004) show that children under the age of 15 years joined the ranks of the FPLC.<sup>1498</sup> However, as set forth above,<sup>1499</sup> the information contained in the MONUC reports is manifestly unreliable and was never verified in any way, and the reports were never intended for use in criminal proceedings.

#### **2.5 Letter of 12 February 2003 from the National Secretary for National Education to the G5 Commander of the FPLC<sup>1500</sup>**

726. The Prosecutor claims that this document proves the presence of child soldiers aged between 10 and 16 years in the FPLC troops.

<sup>1495</sup> EVD-OTP-00678, 00:10:29 to 00:11:30.

<sup>1496</sup> T-346-FRA-ET, p. 47, line 16, to p. 48, line 13.

<sup>1497</sup> To illustrate this point in an entirely different context, it would be absurd to argue that the first words of the French national anthem, *La Marseillaise*, (“[TRANSLATION] Arise children of the fatherland [...]”) specifically addresses children under the age of 18 years.

<sup>1498</sup> See, *inter alia*, ICC-01/04-01/06-2748-Conf, paras. 160-161.

<sup>1499</sup> See *supra*, analysis of Witnesses W-0046 and W-0360.

<sup>1500</sup> EVD-OTP-00518.

727. Such an analysis distorts the exact scope of the document.
728. This document, which at no point mentions the FPLC, refers to a programme abbreviated as “DDRRR”. D01-0011 stated that the DDRRR programme “[TRANSLATION] was not specific to the UPC/RP”, and that it concerned not only the DRC, but also Rwanda and Burundi.<sup>1501</sup> In this respect, the Prosecutor is distorting D01-0011’s words by submitting that this witness confirmed that the letter made reference to children within the ranks of the FPLC.<sup>1502</sup>
729. Similarly, D01-0019 stated in relation to the DDRRR programme: “[TRANSLATION] it was just a demobilization programme, because the DDRRR in this case was a specific programme for the ex-FAR, the Interahamwe, and others in the east of Congo”.<sup>1503</sup> W-0046 also testified that DDRRR was a programme intended to reintegrate foreign combatants, particularly Rwandan combatants, who were on Congolese territory back into their own country.<sup>1504</sup> Hence the evidence clearly shows that the letter of 12 February 2003 was referring to these foreign combatants, not FPLC soldiers specifically.
730. It follows that the phrase “[TRANSLATION] child soldiers aged between 10 to 15 or 16 years” must be interpreted as referring to all the groups targeted by the DDRRR programme, and hence cannot be considered to be evidence of the presence of children from this age bracket within the FPLC.
731. Accordingly, none of the documents on which the Office of the Prosecutor relies proves beyond reasonable doubt that children under the age of 15 years were present within the FPLC.

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<sup>1501</sup> T-347-CONF-FRA-ET, p. 41, lines 17-21.

<sup>1502</sup> ICC-01/04-01/06-2748-Conf, para. 304, and T-347-CONF-FRA-ET, p. 44, line 2, to p. 47, line 14.

<sup>1503</sup> T-346-FRA-ET, p. 34, lines 10-13.

<sup>1504</sup> EVD-OTP-00493, T-38-FRA-ET, p. 12, lines 18 to 23, and p. 13, lines 8 to 11.

### 3. Testimony

#### 3.1 Testimony of witnesses presented as former child soldiers

732. Contrary to what the Prosecutor suggests, only the truthful and reliable testimonies of former child soldiers who were under the age of 15 years during the period covered by the charges, were they to exist, could support a finding beyond any reasonable doubt that children under the age of 15 years were present in the FPLC.
733. If, as the Prosecution claims, the FPLC had recruited children under the age of 15 years en masse, then the Prosecutor should not only have called some of these alleged former child soldiers to testify, but should also have presented all the evidence to support their testimony – in particular, but not exclusively, the testimony of their parents and teachers, their school records, and so on.
734. However, far from providing evidence of the enlistment of children under the age of 15 years, the appearance of the witnesses presented by the Prosecutor as former child soldiers has cast extremely serious doubt over the merits of this allegation.
735. In actual fact, it has emerged that the entirety of the testimonial evidence related to witnesses presented to the Court as former child soldiers was mendacious. As was amply demonstrated in the application for a permanent stay of the proceedings,<sup>1505</sup> all the witnesses who gave evidence as former child soldiers, as well as the intermediaries linked to those witnesses, participated in weaving a web of lies designed to deceive the Court.
736. The fact alone that the Prosecutor did not succeed in calling to testify even one former child soldier who was under the age of 15 years during the period of the charges is sufficient to cast doubt over the merits of his case that child

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<sup>1505</sup> ICC-01/04-01/06-2657-Conf-tENG, paras. 27-228.

soldiers under the age of 15 years were present within the FPLC during the period of the charges.

### 3.2 Other testimony

737. The other witnesses who stated that minors were present in the FPLC basically only provided their own personal assessment of the ages of these alleged child soldiers, based essentially on their physical appearance. The Prosecutor relies *inter alia* on the testimonies of W-0055, W-0038, W-0017, W-0041, W-0016, and W-0046, W-0030, W-0012 and W-0014 to argue that children under the age of 15 years were enlisted or conscripted into the FPLC and that they were used in combat during the period of the charges.
738. The Defence has previously expressed its serious reservations as to the credibility of these witnesses and the obvious bias some of them displayed. However, the observations below show that, even if all these witnesses were to be considered truthful and credible, their testimonies do not establish beyond reasonable doubt the enlistment or conscription of children under the age of 15 years into the FPLC or their participation in hostilities.
739. W-0055: Although the witness testified to the presence of *kadogos* in the FPLC, he did not confirm the presence of children under the age of 15 years, and acknowledged that he was unable to assess the age of the young recruits. He emphasised that there was no recruitment plan in the FPLC, and that the young people joined the army voluntarily. He stated that certain young people attempted to join armed groups despite a refusal from the military authorities, who would sometimes drive them away; he himself drove away one recruit whom he considered too young. W-0055 did not testify to any forcible enlistments.

740. Furthermore, W-0055 mentioned that, usually, when individuals enlisted for training, they were asked questions about their age and place of birth.<sup>1506</sup> Yet, when the Prosecutor alleges that there was no procedure for verifying the age of the recruits in the FPLC, he fails to refer to this part of W-0055's testimony.<sup>1507</sup> The Prosecutor is also misleading when he refers to the testimony of D01-0011 on this point. The witness's sentence which was quoted by the Prosecutor<sup>1508</sup> was entirely unrelated to any procedure for verifying the age of the recruits in the training camps, and instead related to the witness's noting, upon his return to Bunia in May 2003, the presence of child soldiers who were said to have been armed by the UPDF.<sup>1509</sup> W-0011 further stated that he was Mr Thomas Lubanga's private secretary, and that the issue of procedures for verifying the age of recruits when they arrived in the camps was outside his area of responsibility.<sup>1510</sup>

741. W-0038: This witness's assessments of the age of the young soldiers present in the FPLC are based exclusively on their physical appearance. W-0038 testified to only one recruitment campaign in a village, stating that those enlisted were "[TRANSLATION] all big".<sup>1511</sup> At no point did the witness speak of forcible enlistments.

742. W-0017: Although the witness testified to the presence of children under the age of 15 years in the FPLC, this conclusion is based solely on the witness's personal assessment on the basis of the individuals' physical appearance, since W-0017 did not carry out any verification. W-0017 gave evidence relating to a unit of young people in Mamedi, and stated that those young people had

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<sup>1506</sup> T-175-CONF-FRA-CT, p. 82, lines 1-11.

<sup>1507</sup> ICC-01/04-01/06-2748-Conf, para. 168.

<sup>1508</sup> T-348-FRA-ET, p. 2, lines 9-10, "[TRANSLATION] Under the age of 15 years – I couldn't say, because nobody checked that during the meeting".

<sup>1509</sup> T-347-CONF-FRA-ET, p. 12, line 22, to p. 14, line 24, and T-348-FRA-ET, p. 2, line 11, to p. 4, line 2.

<sup>1510</sup> T-347-CONF-FRA-ET, p. 33, line 27, to p. 34, line 19.

<sup>1511</sup> T-114-CONF-FRA-CT, p. 76, lines 16-17, and p. 77, lines 2-5.

been grouped together in order to protect them, and that they had no military functions. Although he estimated the youngest to be 12 years old, there was no verification of the age of these young people in Mamedi. At no point in his testimony did the witness state that there could have been forcible enlistments into the FPLC.

743. W-0041: The witness testified to the presence of children under the age of 15 years in the FPLC, on the basis of his own assessment. However, at no point did he indicate that he possessed specific information as to their age. Furthermore, he highlighted the difficulty in assessing their age, stressing the influence of diet on physical appearance. W-0041 did not observe any significant recruitment by the FPLC from August 2002 onwards, which contradicts W-0014 on this matter.<sup>1512</sup> The witness made no mention of forcible enlistment by the FPLC.
744. W-0016: The witness claimed that he saw children of less than 13-17 years of age at the [REDACTED] camp in August 2002, i.e. before the period of the charges and before the FPLC was formed. The witness based his assessment on general impressions related to their conduct, and had no exact information about their real age. He also stated that he had seen fewer than 4 children in the presidential guard, of whom he estimated that the youngest may have been 14 years old. Again, this is merely a visual assessment by the witness, which was not verified and is contradicted by the testimony of D01-0011 and D01-0019. Moreover, the witness stated that there was no planned recruitment policy and did not testify to any forcible enlistment.
745. W-0046: The witness claimed to have visited Rwampara camp in late March 2003, where he claimed to have seen certain recruits under the age of 15 years in the FPLC. However, the witness allegedly visited Rwampara camp after the

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<sup>1512</sup> W-0041: T-125-CONF-FRA-CT, p. 68, lines 20-24. W-0014: T-182-CONF-FRA-CT, p. 11, lines 14-21.

UPC/RP had been driven out of Bunia by the UPDF on 6 March 2003. Hence it is implausible to claim that recruits assembled by the UPDF in Rwampara in late March 2003 could have belonged to the FPLC. Furthermore, the witness did not provide any details as to the identity of those recruits, and their age was not verified.

746. W-0030: The witness stated on several occasions in his testimony that he observed within the ranks of the UPC/RP the presence of young soldiers whose age he estimated to be from around 9 years to adulthood. This, however, was only the witness's visual assessment of those individuals' ages.
747. The witness also testified that he had seen bodyguards whose age varied from 9 years to adulthood at Thomas Lubanga's residence. However, under cross-examination, he confirmed that he had told the Office of the Prosecutor's investigators that the *kadogos* he had seen at the headquarters appeared to be between 14 and 15 years old, and the witness did not carry out any verification of their age. Moreover, he did not testify to any forcible enlistment.
748. W-0012: The witness stated that he had seen children, some of whom were under the age of 15 years, in the armed groups present in Ituri. However, the witness did not specifically state whether some of those children under the age of 15 years were in the armed wing of the UPC, instead referring to child soldiers belonging to PUSIC.
749. Generally, the witness did not provide any indication as to the information that enabled him to assess the age of the child soldiers he mentioned during his testimony.
750. W-0014: The witness testified that, from 30 July to 20 August 2002, he saw children within the ranks of the UPC whose age he estimated at between 5 and 18 years, on the basis of their physical appearance. The witness provided

no specific examples to support this claim. However, it has been shown that the UPC had no armed wing during that period, which is also outside the period of the charges.

751. The witness claimed that around April 2003, he saw a 12-year-old child in Aru in Jérôme Kakwavu's troops. Yet Kakwavu had defected from the UPC in March 2003. The witness provided no clarification as to the identity of this individual or as to how W-0014 could have assessed his age.
752. W-0031: The Defence refers to its analysis of the evidence in relation to W-0031, demonstrating his lack of credibility.<sup>1513</sup> Furthermore, it should be emphasised that the Prosecutor relies on this witness's testimony to show the "massive presence of children in armed groups".<sup>1514</sup> However, the transcript of the French,<sup>1515</sup> the language in which W-0031 testified before the Court, makes no mention of a "massive" presence of children in armed groups.
753. Finally, the Prosecutor relies on an erroneous version of the testimony of Witness D01-0004 in order to claim that he admitted that children under the age of 12 years enlisted voluntarily into the FPLC.
754. Firstly, the Defence disputes the accuracy of the interpreters' translation of the witness's words in Swahili. The Defence submits that, on the contrary, the witness categorically dismissed the notion that 12-year-old children agreed to be enlisted into the UPC.<sup>1516</sup>
755. Furthermore, even if the proposed translation is accepted, it does not support the Prosecutor's claim; contrary to the Prosecutor's submission, D01-0004 instead stated: "[TRANSLATION] There weren't also up to 12 years of age". He therefore ruled out the enlistment of 12-year-old children. The fact that the

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<sup>1513</sup> See *supra*, paras. 618-637.

<sup>1514</sup> T-199-CONF-ENG-CT, p. 80, lines 3-6.

<sup>1515</sup> T-199-CONF-FRA-CT, p. 80, lines 7-11.

<sup>1516</sup> It is the Defence's position that the witness said, "*Bon, hikukua vile mpaka 12, bengine ilikua ata 14, 15 ... kuendalea*".

witness ambiguously added that “[TRANSLATION] others were even 14, 15 and older” in no way supports the claim that he admitted that 12-year-old children were present in the FPLC.<sup>1517</sup>

756. Accordingly, contrary to what the Prosecutor submits, there is no evidence whatsoever to support the conclusion beyond reasonable doubt that children under the age of 15 years were enlisted into the FPLC.

### **III. Conscription of children under the age of 15 years by the FPLC**

757. To support his claim that children under the age of 15 years were forcibly enlisted into the FPLC, the Prosecutor essentially relies on the testimonies of the alleged former child soldiers W-0089 and W-0031, which are entirely devoid of credibility. Although W-0046 also spoke about forcible enlistments, she collected her information from the alleged child soldiers themselves, and did not verify it.

758. None of the witnesses who claimed to be former FPLC soldiers (W-0055, W-0038, W-0017, W-0016 and D01-0037) or former members of the UPC/RP (W-0041, D01-0019 and W-0011) mentioned even one case of forcible enlistment into the FPLC, still less of forcible enlistment of children under the age of 15 years.

759. Although the Prosecutor submits that the FPLC abducted children en masse from or near schools in Ituri, he failed to carry out any verifications of such allegations and did not call any representatives of those schools to testify on the subject.

760. Furthermore, there are no documents attesting to the existence of cases of forcible enlistments into the FPLC. The report of 6 November 2002 by the FPLC’s G5, *Éric Mbabazi*,<sup>1518</sup> provides evidence to the contrary: although the

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<sup>1517</sup> T-243-CONF-FRA-CT4, p. 24, lines 12-14.

<sup>1518</sup> EVD-OTP-00457.

report notes complaints from the local people about the conduct of the FPLC troops, it contains no references to complaints about the forcible enlistment of civilians.

#### **IV. Participation of children under the age of 15 years in hostilities**

761. The Prosecutor's allegations in relation to the participation of children under the age of 15 years in hostilities, their training, and life in the camps are essentially based on the testimony of the alleged former child soldiers themselves, and should be set aside on the same grounds.

762. Furthermore, it should be emphasised that the Prosecutor's allegation that the FPLC set up 20 training camps in Ituri during the period of the charges<sup>1519</sup> is unfounded. D01-0019 stated that the FPLC had only three training camps – in Mandro, Rwampara and Bule – and never had any training centres in Irumu, Bunia, Katoto, Mamedi, Centrale or Largu.<sup>1520</sup> Furthermore, certain witnesses called by the Prosecutor referred to military camps, not training camps. Moreover, there can be no doubt as to the mendaciousness of these testimonies originating from alleged child soldiers or witnesses linked to them.<sup>1521</sup>

763. All of the foregoing observations necessarily lead to the conclusion that the Prosecutor has not proved beyond reasonable doubt that children under the age of 15 years were enlisted into the FPLC, still less that they were forcibly enlisted and participated actively in hostilities.

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<sup>1519</sup> ICC-01/04-01/06-2748-Conf, paras. 184 and 247.

<sup>1520</sup> T-345-CONF-FRA-ET, p. 18, line 13, to p. 20, line 25.

<sup>1521</sup> See, for example, ICC-01/04-01/06-2748-Conf, para. 247, footnotes 658, 663, 664, 666, 667, 668, 669, 670, 674, 675, 676 and 677.

## **PART V: INDIVIDUAL CRIMINAL RESPONSIBILITY**

### **I. THE OBJECTIVE ELEMENTS**

#### **1. The existence of a “common plan”**

764. The Prosecutor contends that “the Accused and co-perpetrators agreed upon a plan and acted together since 2000, with greater intensity after April 2002, to build an army of predominantly young persons; to create a political movement; using the political and military elements, to take control of Bunia and to assume authority in Ituri with the Accused at the helm and the co-perpetrators in key positions”.<sup>1522</sup>
765. The Prosecutor portrays the conscription and enlistment of children under the age of 15 years and their active participation in hostilities as a consequence of the implementation of this purported plan, rather than an integral part thereof.
766. The Chamber will note that, on one the hand, the purported plan contains no “element of criminality” and, on the other, the description of the plan by the Office of the Prosecutor is founded on materially inaccurate facts.

#### **1.1. The nature of the “plan” ascribed to the Accused**

767. Even if accurate, the facts cited by the Prosecutor as establishing the “common plan” do not constitute any crime within the jurisdiction of the International Criminal Court or comprise any “element of criminality”.
768. What is more, against a backdrop of systematic massacres committed against the Hema community as of 1999 and in the absence of any protection from the Congolese authorities or the international community,<sup>1523</sup> it would have been perfectly legitimate to found a political movement backed by an armed wing,

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<sup>1522</sup> ICC-01/04-01/06-2748-Conf, para. 74.

<sup>1523</sup> W-0360 confirmed that MONUC made no effective intervention to protect the civilian population during the periods of turmoil. T-156-FRA-CT, p. 46, lines 15-22. W-0046: T-207-CONF-FRA-ET, p. 56, lines 3-12, and T-208-CONF-FRA-ET, p. 4, line 24, to p. 5, line 10, and p. 7, lines 4-16.

and, if necessary, one “buil[t] [...] predominantly [of] young persons” to “take control of Bunia and to assume authority in Ituri” in order to restore order and security.

769. The right to “rebellion against oppression”,<sup>1524</sup> by taking up arms if necessary, is an internationally recognised right and the exercise thereof in the circumstances prevailing in Ituri during the material period cannot be considered as the execution of a “concerted plan” to commit crimes. On the contrary, such a “plan” could only have helped to bring to an end the extremely serious crimes of which not only the Hema community but also the entire population of Ituri were victims.
770. In particular, in that context, the project to recruit young people of fighting age, provided that they were over the age of 15 years and had enlisted voluntarily, cannot be considered a criminal purpose. Thus, the “common plan” described by the Prosecutor as founding the criminal responsibility with which the Accused is charged, does not, in actual fact, contain any “element of criminality” and, therefore, cannot form the basis for criminal responsibility.

## **1.2. The material truth of the facts**

771. The Accused does not dispute that, at some point or another, in certain circumstances, he maintained relations between 2000 and 2003 with the individuals whom the Prosecutor describes as “the co-perpetrators”.<sup>1525</sup>
772. However, the Prosecutor’s description of the events that occasioned such relations and their precise nature is manifestly incorrect.

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<sup>1524</sup> The preamble to the Universal Declaration of Human Rights recognizes “rebellion against tyranny and oppression” as a “last resort” to human rights violations. In France, article 2 of the Declaration of the Rights of Man and Citizen of 1789 enshrines “resistance to oppression” as a natural and inalienable human right.

<sup>1525</sup> ICC-01/04-01/06-2748-Conf, para. 77.

- *"The co-perpetrators' political and military alliance"*<sup>1526</sup>

773. The Prosecutor claims that by September 2000 "the co-perpetrators", who included the Accused, "[had already] formed a political and military alliance". He asserts that the Accused became the spokesperson for dissident elements who had broken away from the APC – the armed wing of RCD-Kis, the then ruling government – including Floribert Kisembo, Bosco Ntaganda, Tchaligonza, Kasangaki and Bagonza.
774. This claim is incorrect. As underscored by Witness D01-0019,<sup>1527</sup> the Accused merely acted as spokesperson, not for the mutineers themselves but rather their "parents", having also been delegated by a number of elders, and merely attempted to approach the Ugandan authorities to pursue peace initiatives in order to bring to an end to the serious unrest resulting from the mutiny and to protect the town of Bunia against reprisals.<sup>1528</sup> At no time did the Accused play any role whatsoever in organising that mutiny. Witness W-0012 emphasised that "[...] the person who was in charge of those children was Tibasima John, but not Thomas Lubanga".<sup>1529</sup>
775. By the same token, during that period the Accused did not in any way participate "in recruiting youth for this training". In this regard, Witness W-0116's uncorroborated hearsay evidence<sup>1530</sup> lacks any probative value. As regards the situation of those young persons who had been sent to Uganda following the mutiny, the Accused intervened only on their return to Ituri and in relation to their reintegration into their families.<sup>1531</sup> Witness D01-0011 confirmed the action taken by the Accused to organise the demobilization and

<sup>1526</sup> ICC-01/04-01/06-2748-Conf, paras. 83-85.

<sup>1527</sup> T-343-CONF-FRA-CT, p. 20, lines 20-22.

<sup>1528</sup> T-343-CONF-FRA-CT, p. 5, line 3, to p. 6, line 4, and p. 8, lines 11-28.

<sup>1529</sup> T-168-CONF-FRA-CT, p. 25, lines 7-10.

<sup>1530</sup> T-208-CONF-FRA-ET, p. 78, lines 3-21. W-0116 was not in Ituri in the summer of 2000, the period during which the recruits were allegedly sent to Uganda. See *supra*, paras. 593-517.

<sup>1531</sup> D01-0011: T-346-FRA-ET, p. 60, line 12, to p. 61, line 1. At no point did Witness W-0024 suggest that Thomas Lubanga hampered their reintegration: T-170-CONF-FRA-CT, p. 56 lines 17-22.

reintegration of these children in conjunction with the NGO *SOS Grands Lacs*.<sup>1532</sup>

776. The Accused maintained no further relations with the aforesaid mutineers until March 2002, a year later. Moreover, there is no evidence to suggest that the Accused maintained such relations with them between July 2000 and March 2002.<sup>1533</sup> The theory of a “political and military alliance” during that period is therefore wholly unfounded.

- “Creation of the UPC”

777. The Prosecutor alleges that the UPC was created “[by] the military men who rebelled in 2000 and who organised to defend the Hema community”. He submits that, as of its creation in September 2000, the UPC was established as a political and military group with its own armed wing.<sup>1534</sup>

778. This analysis is not substantiated by any relevant evidence and is wholly at variance with the actual situation at the time.

779. Firstly, the assertion that in 2001 the Accused and the UPC formed a political and military rebel group with an armed wing which aimed to take control of Ituri is manifestly inconsistent with and contradicts the fact that the Accused was appointed Deputy National Secretary for Youth in the then government in early 2001, subsequently Minister for Transport, and finally Commissioner for Defence in the RCD-K/ML government<sup>1535</sup> headed by Mbusa Nyamwisi, and that he retained these responsibilities until April 2002.<sup>1536</sup> It was only in April 2002 that the Accused opposed the RCD-K/ML and, together with other

<sup>1532</sup> D01-0011: T-346-FRA-ET, p. 60, line 12, to p. 61, line 1.

<sup>1533</sup> Witness W-0116’s allegations, which the Accused disputes, that the Accused was in contact with the group which was sent to Uganda relate, in any event, only to the young people in Kyakwanzi camp and not the leaders of the mutiny who were transferred to Jinja camp.

<sup>1534</sup> ICC-01/04-01/06-2748-Conf, paras. 86-88.

<sup>1535</sup> W-0041: T-124-CONF-FRA-CT, p. 79, lines 5-9.

<sup>1536</sup> W-0041: T-124-CONF-FRA-CT, p. 79, lines 5-9; D01-0019: T-343-FRA-CONF-CT, p. 40, lines 25-27.

prominent civilian figures, approached the Ugandan authorities to attempt to oust it from Bunia.<sup>1537</sup>

780. Secondly, the assertion that “[t]he UPC statutes refer to the need for an army, revealing its intention to use military force to achieve its goals” constitutes a gross distortion of the statutes of that political party, which, on its founding, set out the main features of the policy that it aspired to pursue nationally. As highlighted by Witness D01-0019,<sup>1538</sup> it is apparent from the text itself that only the national armed forces of the DRC are referred to, as opposed to any armed wing of the newly created political party, the UPC.<sup>1539</sup> Similarly, the “Programme” prepared and signed on 15 September 2000 by the Accused makes express reference to the “[TRANSLATION] establishment of a national army” and at no time claims the status of a political and military group with its own armed wing.<sup>1540</sup> Likewise for the “Political Declaration of the Managerial Staff of Ituri in the Face of Instituted Injustice by the RCD/KIS-ML under His Excellency Mr Mbusa Nyamwisi’s Presidency” prepared on 17 April 2002. That declaration, which was signed by the Accused and 12 other prominent figures, most of whom were or subsequently became active UPC members, and which was to be considered by the UPC/RP as an essential reference document, in no way suggests that the signatories would have armed units at their disposal.<sup>1541</sup>
781. Thirdly, the allegation that the UPC was created “[by] the military men who rebelled in 2000” flies blatantly in the face of the facts. As confirmed by Witness D01-0019, no soldier or militia member belonged to the circle of

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<sup>1537</sup> EVD-D01-00050. W-0041: T-124-CONF-FRA-CT, p. 79, lines 12-17, and p. 80, line 11, to p. 83, line 3; D01-0019: T-340-FRA-CT, p. 34, line 2, to p. 37, line 9 (for the reasons for Thomas Lubanga’s resignation from the post of Commissioner for Defence).

<sup>1538</sup> For example: T-342-FRA-ET, p. 12, line 17, to p. 13, line 20, and p. 14, line 4.

<sup>1539</sup> EVD-OTP-00661.

<sup>1540</sup> EVD-OTP-00662.

<sup>1541</sup> EVD-D01-00050.

founders of the UPC.<sup>1542</sup> What is more, in September 2000, none of the leaders of the July 2000 mutiny was present in Ituri. Having been transferred to Uganda, and subsequently to Équateur,<sup>1543</sup> they only returned to Ituri in the first few months of 2002<sup>1544</sup> and were later further transferred to Haut Uélé. There is no evidence to establish that there was contact between the Accused and the leaders of the summer 2000 mutiny between late 2000 and March 2002. Furthermore, Witness W-0041 confirmed that a very wide cross-section of the community and region was represented by the founders and members of the UPC, and later the UPC/RP, of which the Hemas formed but a small minority.<sup>1545</sup> The witness described the UPC as “[TRANSLATION] a political party that would bring all Iturians together”.<sup>1546</sup>

782. Accordingly, the Prosecutor’s argument that the Accused and the other “co-perpetrators”, dissident Hema military commanders from the APC, met in September 2000 in the context of an exclusively Hema political and military organisation, the UPC, is wholly unfounded.

*- April 2002 to August 2002*

783. The Prosecutor claims that in that period “the co-perpetrators prepare[d] to assume power in Ituri through military and political means”. In particular, he contends that “in Bunia in the summer of 2002 [the co-perpetrators] each

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<sup>1542</sup> T-340-FRA-CT, p. 23, lines 10-15.

<sup>1543</sup> Witness W-0012 confirms that the Hema commanders who were transferred to Uganda did not take part in the overthrow of Wamba dia Wamba and were led by Tibasima: T-168-CONF-FRA-CT, p. 28, lines 7-24. The Prosecutor blatantly distorts the historical facts by suggesting that the appointment of the Accused as Minister of Defence was the political consequence of the summer 2000 mutiny: the appointment only took place in November 2001, over 16 months later, and after the dissolution of an initial FLC-backed government, ICC-01/04-01/06-2748-Conf, footnote 165.

<sup>1544</sup> W-0012: T-168-CONF-FRA-CT, p. 29, lines 14-15; D01-0019: T-343-CONF-FRA-CT, p. 44, lines 21-28.

<sup>1545</sup> T-126-CONF-FRA-CT, p. 25, line 4, to p. 27, line 4; p. 28, line 8, to p. 30, line 22; and p. 31, line 8, to p. 32, line 10. See also EVD-D01-00050 and EVD-OTP-00721. As regards the FPLC, W-0055 confirms that, as of September 2002, a considerable proportion of staff and commanders were not Iturian (T-178-CONF-FRA-CT, p. 48, lines 2-12; p. 49, lines 4-17; p. 52, line 25, to p. 55, line 2; p. 58, lines 12-19; p. 58, line 25, to p. 59, line 15; and p. 62, lines 16-18). W-0017: T-160-CONF-FRA-CT, p. 39, lines 11-13.

<sup>1546</sup> T-124-CONF-FRA-CT, p. 78, lines 4-7.

contributed to the implementation of the common plan by establishing training camps, recruiting young persons including children under the age of 15, securing weapons and uniforms for the recruits, and leading the operation to oust the RCD-K/ML and take control of Bunia in the name of the Accused and the UPC/FPLC".<sup>1547</sup>

784. Contrary to the Prosecutor's assertion, the trial has demonstrated, firstly, that the armed rebellion which broke out and escalated as of April 2002 was independent of the political activities of the Accused and other UPC members, and, secondly, that at no time did the Accused, who was absent from Ituri and in detention for a substantial part of that period, personally contribute to the armed rebellion.
785. Firstly, as confirmed by Witness W-0041, during the period from April 2002 to August 2002, the Accused acted for the "*Front pour la Réconciliation et la Paix*" (FRP) in initiatives of a purely political nature aimed at securing from the Ugandan authorities<sup>1548</sup> the removal of the government headed by Mbusa Nyamwisi.<sup>1549</sup> Witness W-0041 confirmed that the FRP did not have an armed wing.<sup>1550</sup> Up until August 2002, no document or declaration issued by the UPC or the FRP suggested that the leadership of these organisations were in contact with armed units.
786. Secondly, Witness D01-0019 clearly explained that those political documents issued subsequent to the control of Bunia being secured on 9 August 2002, referring to the UPC as a political and military group "[TRANSLATION] created on 17 April 2002" or "[TRANSLATION] created on 15 September 2000",<sup>1551</sup> and to

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<sup>1547</sup> ICC-01/04-01/06-2748, para. 105.

<sup>1548</sup> T-124-CONF-FRA-CT, p. 81, line 21, to p. 82, line 17, and T-125-CONF-FRA-CT, p. 6, lines 13-20.

<sup>1549</sup> T-124-CONF-FRA-CT, p. 82, line 19, to p. 83, line 3.

<sup>1550</sup> T-125-CONF-FRA-CT, p. 15, lines 10-14.

<sup>1551</sup> It is noteworthy that documents EVD-D01-00050 and EVD-OTP-00662 refer to the "UPC/RP" whereas that abbreviation was only used as of September 2002. Witness W-0041 confirmed that the

the involvement of the UPC or armed units under the Accused's orders in the August 2002 military operations, do not describe the factual reality of events but, instead, are part of UPC political propaganda seeking to claim credit after the fact for ousting the RCD K/ML from Bunia.<sup>1552</sup> Witness W-0041 himself confirmed that the declaration issued in Kinshasa on 11 August 2002 by the FRP membership, which included the Accused, was intended to make political capital out of events to which they had not contributed.<sup>1553</sup> Moreover, the documents from the UPC archives suggesting that the UPC was involved in securing control of Bunia, all of which were issued after 9 August 2002, were intended for public perusal or public political action. The documents' clear propagandistic character rule out the conclusion sought by the Prosecutor.

787. Thirdly, it is not disputed that the Accused was absent from Ituri from shortly after 18 April 2002 until 1 May 2002 (for meetings in Kasese, Uganda), then from late May 2002 until late August 2002.<sup>1554</sup> It is not disputed that during that second period, after staying in Kampala,<sup>1555</sup> the Accused was detained in Kinshasa at the government facility for political prisoners, DEMIAP ("*détection militaire anti patrie*" [Detection of Unpatriotic Activities Police]), for around one month.<sup>1556</sup> Contrary to the Prosecutor's submission, there is no evidence to establish that the Accused acted in concert with leaders of the armed rebellion

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"UPC/RP" was created in September 2002. T-125-CONF-FRA-CT, p. 20, lines 10-13. D01-0019: T-341-FRA-ET, p. 27, line 15.

<sup>1552</sup> See, for example, T-340-FRA-CT, p. 55, line 1, to p. 56, line 7, and T-342-FR-ET, p. 22, lines 17-28, and p. 24, lines 23-26.

<sup>1553</sup> T-126-CONF-FRA-CT, p. 16, lines 1-11, and T-125-CONF-FRA-CT, p. 15, lines 6-7. EVD-OTP-00663.

<sup>1554</sup> See analysis of Witness W-0041 and T-124-CONF-FRA-CT, p. 83, lines 12-15, and T-125-CONF-FRA-CT, p. 89, line 24, to p. 90, line 1. Witness W-0041 stated that Thomas Lubanga was posted to Bunia as FRP representative with the Minister for Human Rights in late August 2002, at the instigation of the authorities in Kinshasa: T-125-CONF-FRA-CT, p. 17, line 13, to p. 18, line 7. D01-0019: T-340-FRA-CT, p. 41, lines 5-24.

<sup>1555</sup> W-0041: T-126-CONF-FRA-CT, p. 6, lines 14-21.

<sup>1556</sup> W-0041: T-125-CONF-FRA-CT, p. 9, line 14, to p. 12, line 11; T-126-CONF-FRA-CT, p. 10, line 8, to p. 11, line 2. See also EVD-D01-00047. D01-0019: T-340-FRA-ET, p. 41, lines 18-22, and D01-0011: T-346-FRA-ET, p. 63, lines 3-9.

led by dissident APC elements and Chief Kahwa.<sup>1557</sup> In that regard, Witness W-0014's statements are irrelevant and devoid of probative value.<sup>1558</sup> Witness W-0041, who was with the Accused in Kinshasa during that period, merely conceded that it was technically possible to contact Bunia by telephone, albeit in difficult conditions, and at no time suggested the existence of any concerted action between the Accused and the leaders of that armed rebellion.<sup>1559</sup>

788. Fourthly, Witness D01-0019 made it clear that the armed rebellion was organised at some time in June, July or August 2002, at the instigation and under the leadership of dissident APC elements and Chief Kahwa,<sup>1560</sup> autonomously and not in concert with the UPC membership or Thomas Lubanga.<sup>1561</sup> This evidence is corroborated by the statements of Witnesses W-0016<sup>1562</sup> and D01-0037<sup>1563</sup> and by the fact that no document issued by the UPC or the FRP prior to 9 August 2002 refers to any such concerted action. The large-scale recruitment campaign from May to August 2002 referred to by the Prosecutor<sup>1564</sup> took place whilst the Accused was outside Ituri, sometimes even abroad or in detention, and was unable to contribute personally to it in any way. It is undeniable that the Accused could only have been apprised of the existence and outcome of the recruitment campaigns on his return to Bunia in late August 2002.

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<sup>1557</sup> Witness W-0041 claimed that no communication with the outside was possible during detention at DEMIAP. T-126-CONF-FRA-CT, p. 9, lines 22-25. Chief Kahwa was not a member of the UPC at the time: T-340-FRA-CT, p. 44, lines 2-4 (D01-0019).

<sup>1558</sup> See *supra*, analysis of W-0014.

<sup>1559</sup> T-125-CONF-FRA-CT, p. 16, lines 4-15.

<sup>1560</sup> D01-0037: T-349-FRA-ET, p. 4, line 24, to p. 5, line 1; p. 6, lines 14-22; p. 6, line 28, to p. 7, line 5. D01-0019: T-340-FRA-ET, p. 48, line 24, to p. 49, line 6.

<sup>1561</sup> T-340-FRA-CT, p. 41, line 25, to p. 42, line 3, and p. 43, lines 2-3, and T-340-FRA-ET, p. 48, lines 24-27. W-0017 confirmed Chief Kahwa's role: "[TRANSLATION] I've always considered the armed part of the UPC as originating with Kahwa". T-160-CONF-FRA-CT, p. 45, lines 7-19.

<sup>1562</sup> See *supra*, analysis of W-0016's testimony.

<sup>1563</sup> T-349-FRA-ET, p. 18, lines 1-8.

<sup>1564</sup> ICC-01/04-01/06-2748-Conf, para. 107.

- *Securing control of Bunia in August 2002*

789. The Prosecutor asserts that “the takeover of Bunia was done by and on behalf of the UPC”. He alleges that “the Accused could act in concert with these persons, notwithstanding his physical separation from them, because the plan had been rooted long before and each co-perpetrator knew what he had to accomplish in order to further the group’s common goals”.<sup>1565</sup>
790. The Prosecutor’s claims are pure unfounded conjecture. They are contradicted both by the statements of Witnesses W-0041<sup>1566</sup> and D01-0019<sup>1567</sup> and by the absence of any evidence to establish the existence of any actual concerted action between the Accused and the leaders of the armed rebellion from May to August 2002 inclusive.
791. The documents invoked by the Prosecutor are irrelevant:
792. Firstly, the photograph<sup>1568</sup> showing the Accused with Kitembo, Bosco, Rafiki and Kasangaki was taken over two years before the events of August 2002 and is intrinsic to the July 2000 events in the course of which the Accused had agreed to take part in talks with the Ugandan authorities to resolve the crisis resulting from the rebellion by certain APC elements.<sup>1569</sup> On that occasion, the Accused had agreed to be photographed with some of them. The fact that a relationship of trust was able to develop between these persons and the

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<sup>1565</sup> ICC-01/04-01/06-2748-Conf, para. 118.

<sup>1566</sup> T-125-CONF-FRA-CT, p. 16, lines 4-15. “[TRANSLATION] At that point in time I wonder whether there was really an organised army. What I was to learn later, to the best of my recollection, was that the Ugandan army had supported those soldiers to drive out Molondo Lomondo from Bunia, but I say that with due reservations.”

<sup>1567</sup> T-340-FRA-CT, p. 53, line 22, to p. 54, line 3 and p. 55, line 26, to p. 56, line 7. D01-0019, as a Mambisa elder, took part in a meeting between Kahwa and some elders, at which the issue of determining who was to be entrusted with the political management of Ituri after the capture of Bunia in August 2002 by Kahwa and the mutineers was discussed: T-340-FRA-ET, p. 59, line 23, to p. 60, line 17.

<sup>1568</sup> ICC-01/04-01/06-2748-Conf, para. 119. EVD-OTP-00529.

<sup>1569</sup> During the trial, the Prosecutor confirmed his position that this photograph had been taken on the occasion of those events in 2000: T-252-CONF-FRA-CT, p. 23, lines 1-3. See also T-343-CONF-FRA-CT, p. 13, line 13.

Accused on that occasion partially explains why they looked to him as a political leader in September 2002. Nevertheless, the photograph is wholly irrelevant as regards determining the existence of a “common plan” in July and August 2002 to recruit armed units and secure control of Bunia and Ituri.

793. Secondly, the existence of documents from the UPC/RP archives referring to the purported military role of UPC units in events prior to September 2002<sup>1570</sup> lacks any probative value. As has previously been demonstrated, these documents, which were actively disseminated to a national and international audience, were part of the UPC propaganda strategy<sup>1571</sup> and in no way prove that the events alleged in support of the propaganda were real.
794. There is no contradiction undermining Witness D01-0019’s statements in this regard. His statement that the UPC and the Accused did not contribute to securing control of Bunia in August 2002 does not contradict his acknowledgement of the fact that the UPC/RP had “taken arms to remove all the forces that contribute to the destruction of Ituri” and “put an end to the management of Ituri by the RCD-K/ML”, which was indeed the case as of September 2002, after the formation of the UPC/RP.<sup>1572</sup>
795. Thirdly, it is incorrect to claim that the Accused’s rise in September 2002 to the top of the UPC/RP, its government, and its armed wing, the FPLC, can only be explained by the existence of a plan which had long been agreed.<sup>1573</sup> Witness D01-0019 specifically explained that, following a phase of discussion and

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<sup>1570</sup> ICC-01/04-01/06-2748-Conf, paras. 120-127.

<sup>1571</sup> Particularly in relation to the “*dialogue intercongolais global et inclusif*” [“Global and All-Inclusive Inter-Congolese Dialogue”] aimed at establishing transitional institutions and, therefore, power-sharing in the DRC (see EVD-OTP-00665). D01-0019: T-342-FRA-ET, p. 22, line 17, to p. 24, line 26. Likewise for documents EVD-D01-00078 (“*Aide-Mémoire à l’intention du Sir Ketumile Masire Facilitateur neutre du Dialogue intercongolais*” [“*Aide-mémoire for the attention of Sir Ketumile Masire, neutral facilitator of the Inter-Congolese Dialogue*”]) and EVD-OTP-00674 (“*Déclaration officielle*” [“Official statement”] dated 14 September 2002).

<sup>1572</sup> ICC-01/04-01/06-2748-Conf, para. 128.

<sup>1573</sup> ICC-01/04-01/06-2748-Conf, para. 129.

uncertainty, the leaders of the rebellion agreed, after contemplating the appointment of John Tibasima, to choose Thomas Lubanga as political leader.<sup>1574</sup> This appointment can reasonably be viewed as ensuing from the old relationship of trust forged between the insurgents and the Accused, the courageous political initiatives he took to protect communities against acts of violence committed or endorsed by the previous government – earning him around one month’s incarceration in the political prison in Kinshasa<sup>1575</sup> – and from the fact that, at the time, after the RCD-K/ML’s departure, the UPC was the sole political party in Ituri in a position to be an interlocutor of the Ugandan authorities, the occupying power, and the representatives of the international community (MONUC).<sup>1576</sup> The theory of the existence of a “concerted plan” is therefore as futile as it is unfounded.

796. Witness D01-0037, a member of the armed force established in Mandro at the initiative of Chief Kahwa and the other dissidents, confirmed that the rapprochement between the leaders of that armed rebel force and the UPC took place after securing control of Bunia.<sup>1577</sup> Witness W-0012 stated that the control of Bunia was secured by “[TRANSLATION] groups of Hema soldiers”<sup>1578</sup> and explained that these “[TRANSLATION] groups of Hema militia members” went on to establish their UPC government after Thomas Lubanga’s return.<sup>1579</sup>

*- The Accused as President and Commander-in-Chief*

797. It is self-evident that participation in a governmental organisation does not, *per se*, amount to participation in a “concerted plan” to commit crimes. The Prosecutor’s observations on the Accused’s purported powers as President of

<sup>1574</sup> T-342-FRA-ET, p. 24, lines 1-7, and T-340-FRA-CT, p. 56, line 12, to p. 58, line 8.

<sup>1575</sup> D01-0019: T-340-FRA-CT, p. 34, line 6, to p. 37, line 9.

<sup>1576</sup> See, for example, D01-0019: T-340-FRA-CT, p. 60, line 22, to p. 61, line 7.

<sup>1577</sup> T-349-FRA-ET, p. 18, lines 4-8.

<sup>1578</sup> T-168-CONF-FRA-CT, p. 44, line 23, to p. 45, line 9.

<sup>1579</sup> T-168-CONF-FRA-CT, p. 47, line 23, to p. 48, line 2.

the UPC/RP<sup>1580</sup> are therefore irrelevant, unless a nexus to the commission of a specific crime is established.

*- 6 March 2003 to 30 May 2003*

798. It is well-established that in the aftermath of the fighting of 6 March 2003 between the Ugandan forces and the FPLC, the UPC/RP executive, ousted from Bunia, was dispersed and no longer exerted any control over the territory of Ituri.
799. The Accused left Bunia on 5 March 2003 and was only to return there on 29 May 2003.<sup>1581</sup> He was outside the DRC for most of this period.<sup>1582</sup> For the entire period, the UPC/RP executive was unable to meet,<sup>1583</sup> and there is no evidence to suggest the existence of contacts and concerted action between the Accused and the military hierarchy.<sup>1584</sup>
800. It follows that no “common plan” could have existed during that period between the Accused and those individuals described by the Prosecutor as the other “co-perpetrators”.
801. It can be seen from these observations that:
- No “concerted plan” of any nature or purpose whatsoever united the Accused and the individuals presented by the Prosecutor as the other “co-perpetrators” of the prosecuted crimes prior to early September 2002. Moreover, the events prior to that date, outside the period covered by the charges, fall outside the Chamber’s jurisdiction;

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<sup>1580</sup> ICC-01-04-01/06-2748, paras. 131-137.

<sup>1581</sup> D01-0011: T-347-CONF-FRA-ET, p. 10, lines 6-19.

<sup>1582</sup> D01-0011: T-347-CONF-FRA-ET, p. 10, line 6, to p. 12, line 3, and D01-0019: T-341-FRA-ET, p. 30, lines 7-17.

<sup>1583</sup> W-0041: T-126-CONF-FRA-CT, p. 33, lines 19-23. EVD-D01-00051, p. 0091 “[TRANSLATION] noting that the hiatus in the work of the UPC/RP executive from 6 March to 12 May 2003 dispersed its members”.

<sup>1584</sup> See D01-0019: T-341-FRA ET, p. 29, line 12, to p. 30, line 1.

- As from September 2002, the institutional links uniting the Accused with the civilian and military officials of the UPC/RP and the FPLC cannot be regarded as establishing in and of themselves the existence of a “concerted plan” of a criminal character. In particular, given the prevailing circumstances, the enterprise alleged by the Prosecutor, namely the control of a territory by military means requiring the enlistment of recruits, does not contain any “element of criminality”.<sup>1585</sup> Any crimes committed during the implementation of this alleged enterprise cannot be regarded as the inevitable consequences of the enterprise itself, particularly when the criminal conduct contravenes express instructions;
- No “concerted plan” of any nature or purpose whatsoever united the Accused and the individuals presented by the Prosecutor as the other “co-perpetrators” of the prosecuted crimes, between 6 March and 30 May 2003.

## **2. The absence of an “essential contribution” on the part of the Accused to the commission of the prosecuted crimes**

### **2.1 The absence of “effective control” over the FPLC**

802. The Prosecutor seeks to demonstrate that, in his capacity as President and “commander-in-chief”, the Accused exercised over the FPLC, portrayed as a highly structured force,<sup>1586</sup> “effective control”<sup>1587</sup> via a “chain of command”.<sup>1588</sup>

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<sup>1585</sup> In particular, many witnesses testified that the military operations conducted by the FPLC targeted either the Ugandan armed forces, the APC (the armed wing of the RCD-K/ML), or FNI combatants; the purpose of these operations was not to cleanse a territory ethnically, but merely to control the territory in order to re-establish order and security. W-0055: “[TRANSLATION] He told them that our enemy for the time being was the APC”: T-175-CONF-FRA CT, p. 71, line 24, to p. 72, line 6. See also, for example, W-0041: T-126-CONF-FRA-CT, p. 17, lines 7-9; D01-0019: The UPC had begun to wage war on the enemies of peace: T-344-FRA-ET, p. 34, lines 12-20.

<sup>1586</sup> ICC-01/04-01/06-2748-Conf, para. 237.

<sup>1587</sup> ICC-01/04-01/06-2748-Conf, para. 285.

<sup>1588</sup> ICC-01/04-01/06-2748-Conf, para. 237. Paragraphs 237-275 and paragraphs 283-285 appear to fall within this view.

He portrays the members of the FPLC Staff and military hierarchy as “subordinate to the Accused”<sup>1589</sup> and appears to consider that all these elements establish an “essential contribution” on the part of the Accused to the commission of the prosecuted crimes.

803. This analysis is manifestly erroneous:

804. Firstly, the Prosecutor distorts the scope of the evidence presented at trial.

805. For example:

*“Communication and hierarchy”*

806. Contrary to what the Prosecutor suggests, whilst it is true that the Accused had the *de jure* authority to issue instructions to the Chief of Staff and to request to be kept informed of certain situations, there is, however, no evidence to show that the Accused issued instructions relating to the organisation or execution of military operations or operations for recruiting or training young recruits. That the Accused did not issue any instructions is confirmed by the logbook submitted by the Prosecutor:<sup>1590</sup> this logbook clearly shows that the instructions concerning military units and operations came not from the Accused, but directly from the Staff or other commanders of the FPLC.

807. With regard to the information relayed to the Accused, the “*Rapport mensuel du Bureau 5*” [Monthly Report from Bureau 5]<sup>1591</sup> dated 6 November 2002 is particularly significant: it is apparent from the document itself that this report, which provides a very comprehensive survey of the military situation and the difficulties encountered by the FPLC, was sent by the G5 Staff Officer to the Chief of Staff only. There is no evidence to suggest that the Accused was

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<sup>1589</sup> ICC-01/04-01/06-2748-Conf, para. 255.

<sup>1590</sup> EVD-OTP-00409.

<sup>1591</sup> EVD-OTP-00457.

informed of that report. It is inaccurate, therefore, to claim that the Accused was kept closely informed of the FPLC's activities.

*"FPLC training and military camps"*

808. The Prosecutor alleges the existence of "20 training military camps throughout the region".<sup>1592</sup> In fact, the Prosecutor deliberately includes the three training camps that actually existed (Rwampara, Mandro and Bule) with all the locations where, at one time or another, FPLC troops were stationed or conducted operations.<sup>1593</sup>
809. With regard to Mandro training camp, the Prosecutor claims that "the UPC/FPLC authorities had a brick house at their disposal which the Accused himself used during his visits to the camp". This allegation is completely contrary to the explanations provided by Witness W-0016 who, rectifying an error, confirmed that there were no brick buildings in this camp situated around 4 km from the village of Mandro.<sup>1594</sup> The witness stated that it was at the village of Mandro, and not at the camp, that the Accused was accommodated in the home of Chief Kahwa.<sup>1595</sup>
810. Contrary to the Prosecutor's claims, none of the witnesses he called claimed that the Accused was presented as the "supreme chief".<sup>1596</sup>
811. Secondly, contrary to what the Prosecutor maintains, the trial has shown that the Accused, the *de jure* "commander-in-chief", did not have *de facto* effective power of control over these forces.

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<sup>1592</sup> ICC-01/04-01/06-2748-Conf, para. 247.

<sup>1593</sup> For example, with regard to the Sota, Ndromo, Mudzipela, Epo, Ndromo, Joo, Nyoka, Katoto, Nizi and Barrière camps, the references cited by the Prosecutor do not provide conclusive evidence that these camps were used for military training. See ICC-01/04-01/06-2748-Conf, footnotes 658-677.

<sup>1594</sup> T-191-CONF-FRA-CT, p. 33, line 22; p. 34, line 25; p. 35, line 4; and p. 42, lines 13-14.

<sup>1595</sup> T-190-CONF-FRA-CT, p. 60, lines 11-24.

<sup>1596</sup> The references cited by the Prosecutor do not support the Prosecutor's allegation that "[...] the accused was the head of the organisation and the Supreme Chief. The other commanders in the camp always referred to him as such" [emphasis added], ICC-01/04-01/06-2748-Conf, para. 187.

812. Witnesses W-0012 and W-0038 confirmed that, even regarding decisions of the highest political and military importance, the upper ranks of the FPLC had the *de facto* power to challenge the Accused's decisions. Thus, the witnesses confirmed that the attack of 6 March 2003 launched by the FPLC on Ugandan troops was decided upon by FPLC Staff against the Accused's clearly expressed opinion.<sup>1597</sup> Witness W-0017 emphasised that Chief of Staff Floribert Kisembo's influence on the soldiers was much greater than that of the Accused<sup>1598</sup> and confirmed that the Accused's role was essentially political.<sup>1599</sup> Witness W-0016 stated that certain operations were conducted without informing the President.<sup>1600</sup>
813. Witness W-0055 also confirmed that the Accused would merely confirm the military authority's decisions with regard to military organisation,<sup>1601</sup> and stated that he never saw the Accused participate in a meeting of the General Staff.<sup>1602</sup>
814. Within the military structure itself, depending on the circumstances, the commanders manifested clear autonomy. Witness W-0055 thus confirmed that recruitment operations were conducted on the initiative of the commanders themselves without consulting their superiors.<sup>1603</sup>

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<sup>1597</sup> W-0012: T-169-CONF-FRA-CT, p. 51, lines 2-15. W-0038: T-114-CONF-FRA-CT, p. 71, line 24 to p. 73, line 12.

<sup>1598</sup> T-160-CONF-FRA-CT, p. 42, lines 1-4, and p. 45, lines 7-19.

<sup>1599</sup> W-0017: "[TRANSLATION] Thomas was actually a political figure, and the army was something of a side issue". T-160-CONF-FRA-CT, p. 44, line 17, to p. 45, line 19, and p. 46, lines 2-12.

<sup>1600</sup> T-189-CONF-FRA-CT, p. 81, line 24, to p. 82, line 5. "[TRANSLATION] Sometimes there were operations which the President was not even told about."

<sup>1601</sup> T-175-CONF-FRA-CT, p. 31, line 25, to p. 32, line 3, and p. 34, lines 13-19.

<sup>1602</sup> T-175-CONF-FRA-CT, p. 41, lines 10-19. He also stated that Chief of Staff Floribert Kisembo decided to travel to Rwanda without even informing the Accused. *Idem*, p. 24, lines 3-18.

<sup>1603</sup> T-175-CONF-FRA-CT, p. 63, line 13, to p. 64, line 8; T-176-CONF-FRA-CT, p. 64, lines 9-25.

815. The successive defections of the main FPLC commanders,<sup>1604</sup> who, together with their troops, decided one after another to withdraw their support for the UPC/RP and even to oppose it militarily, show clearly that the FPLC was in fact the precarious result of alliances of autonomous forces rather than a highly structured army under the sole leadership of a “commander-in-chief”. Witness W-0055, referring to the situation of commander Jérôme Kakwavu, who was in charge of the entire Aru sector, confirmed “[TRANSLATION] that he had the power to dissociate himself from the movement, to leave with his troops”.<sup>1605</sup>
816. The defection of Chief of Staff Floribert Kisembo himself and his troops in December 2003<sup>1606</sup> confirms the undeniable autonomy and authority asserted by the military leaders, who went so far as to seek to oust the Accused as President of the movement.
817. These observations show that the Accused did not at any time play a central role in the military structure under the control of Floribert Kisembo.
818. Thirdly, as previously stated, the Accused is not being prosecuted as a civilian or military superior for acts committed by his subordinates, but for having committed the prosecuted crimes personally. Nor is he being prosecuted for having committed these crimes “through another person” (“indirect perpetration”). Accordingly, in no circumstances can he be held responsible on the basis of the “effective control” he allegedly exercised over his civil or military subordinates. The Prosecutor’s lengthy and fruitless arguments seeking to demonstrate the Accused’s “effective control” over the FPLC and

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<sup>1604</sup> Defection of Jérôme Kakwavu: W-0055: T-178-CONF-FRA-CT, p. 19, lines 15-23. Confirmed by D01-0019: T-341-FRA-ET, p. 23, lines 18-28. Defections of Chaligonza, Kasangaki and Munyalizi: T-178-CONF-FRA-CT, p. 61, lines 6-21.

<sup>1605</sup> T-178-CONF-FRA-CT, p. 21, lines 19-20.

<sup>1606</sup> EVD-D01-01092.

his knowledge of the crimes allegedly committed by them are, therefore, irrelevant in the instant case.

819. The fact that the Accused allegedly, in his capacity as a superior, played a central role in the functioning of his organisation cannot establish the “essential contribution” to the commission of the prosecuted crimes that is required by article 25(3)(a). Such an interpretation, which would, *ipso facto*, make the leader of an organisation a co-perpetrator under article 25(3)(a), would in effect result in depriving of all meaning and purpose article 28 of the Statute, which specifically provides for the criminal responsibility of civil and military superiors for the acts committed by their subordinates. Such conflation of the responsibility for commission as a co-perpetrator with the specific responsibility as superior, or even with responsibility for “indirect perpetration”, is unacceptable. The Pre-Trial Chamber creates this confusion by attributing to the Accused crimes allegedly committed by FPLC commanders, solely on the ground that he allegedly played “a key overall co-ordinating role in the implementation of the common plan”.<sup>1607</sup>

820. The Accused’s alleged “effective control” over the perpetrators of the alleged crimes cannot in itself form the basis of responsibility as co-perpetrator; such responsibility requires the demonstration of a deliberate, positive and personal essential contribution to the commission of the prosecuted crimes. The following observations show that the Accused made no positive or personal “essential contribution” to the execution of these crimes.

## **2.2 The absence of an “essential contribution” to the recruitment, training and assignment of recruits**

821. The Accused did not personally contribute to recruitment and training operations; he did not participate in the assignment and use of recruits.

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<sup>1607</sup> ICC-01/04-01/06-796-Conf-tEN, para. 383.

*- The Accused's alleged role in military operations and in the procurement of weapons and ammunition*

822. The Prosecutor claims that the Accused “was integrally involved in military operations and tactics” and that he “was instrumental in securing arms and ammunitions, and providing the logistical framework for the UPC/FPLC”.<sup>1608</sup>
823. Contrary to this depiction, Witnesses W-0055 and W-0016 confirm that the Accused did not participate in organising or carrying out military operations, but, at the most, merely stayed informed of them and authorised, where necessary, the use of certain resources.<sup>1609</sup>
824. In any case, the Accused’s alleged role in organising the logistics of military activities is irrelevant to his hypothetical contribution to the prosecuted crimes. It is self-evident that the leader of a political and military group cannot be considered criminally responsible for any crimes committed by his or her troops solely on the ground that he or she contributed logistically to facilitating their activities. In the instant case, any logistical or budgetary authorisations issued by the Accused cannot be regarded as a decisive contribution to the enlistment of recruits, and *a fortiori* of children under the age of 15 years or to their use in combat. Clearly, the recruitment operations did not in any way depend on this alleged role the Prosecutor has ascribed to the Accused.
825. The same applies regarding the Accused’s alleged role in providing the FPLC with weapons and ammunition.
826. In general, the fact that, in his capacity as President, the Accused allegedly played an important “overall coordinating” role in the UPC/RP political and

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<sup>1608</sup> ICC-01/04-01/06-2748-Conf, paras. 276-282.

<sup>1609</sup> W-0016: T-190-CONF-FRA-CT, p. 9, lines 12-17, and W-0055: T-178-CONF-FRA-CT, p. 60, line 22, to p. 61, line 5.

military group does not, as such, constitute an “essential contribution” to the commission of any crimes committed by the members of that organisation.

*- The Accused's visits to the training camps for recruits*

827. The Prosecutor claims that the Accused “also visited the military staff and recruits at HQ and in the training camps”.<sup>1610</sup> He maintains that, in so doing, the Accused “encouraged”<sup>1611</sup> the practice of enlisting and using child soldiers under the age of 15 years.
828. The Accused, who does not contest that he visited Rwampara training camp, does, however, contest that he visited other training camps. It has been shown that the statements of Witness W-0038 and Witnesses W-0007, W-0157 and W-0299 claiming that the Accused visited Mandro training camp are manifestly mendacious.<sup>1612</sup>
829. In any case, regardless of the age of the recruits, the mere fact of visiting a training camp for young recruits and of delivering to them a morale-boosting talk cannot be considered as an essential contribution to recruitment operations.<sup>1613</sup>
830. Furthermore, “encouraging” the enlistment of young recruits, even if under the age of 15 years, cannot, as such, form the basis of criminal responsibility as co-perpetrator. It could at most form the basis of complicity under article 25(3)(b), a form of responsibility which does not appear in the *Decision on the confirmation of charges*.

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<sup>1610</sup> ICC-01/04-01/06-2748-Conf, para. 264.

<sup>1611</sup> ICC-01/04-01/06-2748-Conf, para. 286.

<sup>1612</sup> See *supra*, Part III.

<sup>1613</sup> SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgement, 02/08/2007, para. 960: “Specifically regarding the commanders’ meeting, the Chamber finds that Fofana’s mere presence does not demonstrate beyond reasonable doubt that he encouraged anyone to make use of child soldiers”; para. 961: “The Chamber further finds that the presence of Fofana at Base Zero where child soldiers were also seen is not sufficient by itself to establish beyond reasonable doubt that Fofana had any involvement in the commission of these criminal acts under any of the modes of liability charged in the Indictment.”

831. The Prosecutor cannot, therefore, claim that the Accused's visits to training camps establish the "essential contribution" required by article 25(3)(a).

*- Participation in awareness and recruitment drives*

832. The Prosecutor claims that the Accused helped to organise awareness and recruitment drives. He alleges in particular that "[...] people [were] sent out to the villages so that young people could be mobilised, integrated into the army and trained"<sup>1614</sup> and that the Accused trained "cadres" to carry out these awareness drives. Finally, he maintains that child recruitment drives were carried out in villages under the command of the G5 Staff Officer.<sup>1615</sup>

833. Contrary to the Prosecutor's claim, it was shown at trial that the Accused did not participate at any time in recruitment operations.

834. Firstly, as Witness D01-0019 clearly stated,<sup>1616</sup> all the armed units which were organised in September 2002 under the name "FPLC" were recruited by the dissident soldiers of the APC and Chief Kahwa between June and August 2002, that is, a period when the Accused was away from Ituri and, hence, could not in any way have contributed to such recruitment. As previously shown, the Accused and the UPC had nothing to do with these recruitment drives. As will be explained later, as soon as he assumed his position as head of the UPC/RP, the Accused ordered an unequivocal prohibition on the enlistment of minors.

835. Secondly, whether true or false, the allegation that "old Gegere wise men" encouraged the local people to join the army is irrelevant in the instant case. Indeed, there is no evidence to show that the Accused organised or initiated such operations. Witness W-0055 merely alleged that there were conversations

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<sup>1614</sup> ICC-01/04-01/06-2748-Conf, para. 288.

<sup>1615</sup> ICC-01/04-01/06-2748-Conf, para. 289.

<sup>1616</sup> T-340-FRA-CT, p. 49, line 24, to p. 50, line 24. D01-0019 stated that their number rose from around 36 to hundreds. T-340-FRA-CT, p. 51, lines 17-21. See also D01-0037: T-349-FRA-ET, p. 6, lines 10-20.

between the Accused and one of these “wise men”<sup>1617</sup> and did not claim that during these meetings, the Accused issued instructions in this regard.<sup>1618</sup> Furthermore, if established, collaboration of this nature could not be regarded as an essential contribution without which the crime would not have been committed.

836. Thirdly, it is incorrect to claim that the Accused “trained” “cadres” responsible for “mobilising people wherever the UPC/FPLC was deployed in Ituri”. On this point, the Prosecutor presents the statement of Witness W-0055 in a totally misleading light; in fact, during cross-examination, this witness clearly acknowledged that he did not know how these cadres were trained<sup>1619</sup> and explained that their role was to explain to the people the history of the movement and its objectives in order to convince the civilian population to support the UPC/RP.<sup>1620</sup> Thus, the Accused was in no way involved in these awareness drives, which, moreover, were far from being a military recruitment drive.

837. Fourthly, it is incorrect to claim that the Accused personally contributed to recruitment drives. Witness W-0041 confirmed that there was no “[TRANSLATION] systematic recruitment as a matter of course” as from 2 September 2002.<sup>1621</sup> The witness explained that “[TRANSLATION] ...it’s very difficult for me to say when the UPC recruited, as the UPC fighters I found in the field, when I returned from Kinshasa, most had already been trained or

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<sup>1617</sup> Eloy Mafuta: contrary to the Prosecutor’s claim, this individual was never a founder or member of the UPC, as is confirmed by an analysis of the Statutes and other documents from the UPC archives. D01-0019: T-343-FRA ET, p. 34, line 9; EVD-OTP-00661; EVD-OTP-00714; etc.

<sup>1618</sup> T-174-CONF-FRA-CT, p. 36, lines 2-6, and T-176-CONF-FRA-CT, p. 18, lines 10-21, and p. 21, lines 4-11.

<sup>1619</sup> T-177-CONF-FRA-CT, p. 50, lines 3-13, and p. 51, lines 6-14.

<sup>1620</sup> T-177-CONF-FRA-CT, p. 46, line 22, to p. 47, line 3; p. 47, lines 21-25; p. 48, line 17 to p. 49, line 10; and p. 52, lines 5-7.

<sup>1621</sup> T-125-CONF-FRA-CT, p. 68, lines 18-24.

were in the process of being trained”.<sup>1622</sup> The witness thus established that the “FPLC” fighters had, for the most part, already enlisted between his departure from Bunia in May 2002 and his return in late August 2002, and that he did not observe any significant recruitment as from that date.

838. Contrary to the Prosecutor’s claim, Witness W-0055 emphasised that there was no recruitment policy and the enlistment of young people into the army was mainly at the personal behest of the commanders.<sup>1623</sup> On this point, the Prosecutor seriously distorts the witness’s testimony: at no time did the witness state that recruitment was a practice that “was entrenched within the UPC/FPLC philosophy and was an established procedure” [emphasis added].<sup>1624</sup> Witness W-0016, [REDACTED], emphasised that “[TRANSLATION] there weren’t people actually looking for recruits”<sup>1625</sup> and stated that he had never seen G5 Officer Mbabazi carry out recruitment.<sup>1626</sup>
839. The “*rappport mensuel interne*” [monthly internal report]<sup>1627</sup> ascribed to G5 Staff Officer Eric Mababazi and addressed to the Chief of Staff makes no mention of “attempts to recruit children”<sup>1628</sup> but merely notes, amongst other matters, that the conduct of other soldiers “demoralises” the civilian population and thus discourages voluntary enlistment. There is no evidence to suggest that the Accused personally participated in recruitment drives or that he was kept informed specifically about the enlistment of recruits into the FPLC.<sup>1629</sup> The Prosecutor seriously distorts the testimony of Witness W-0055 by claiming

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<sup>1622</sup> T-125-CONF-FRA-CT, p. 70, lines 19-24.

<sup>1623</sup> See analysis of Witness W-0055, *supra*, paras. 476-515 and T-176-CONF-FRA-CT, p. 64, lines 15-25.

<sup>1624</sup> ICC-01/04-01/06-2748-Conf, para. 167.

<sup>1625</sup> T-189-CONF-FRA-CT, p. 79, line 2.

<sup>1626</sup> T-189-CONF-FRA-CT, p. 79, lines 9-14.

<sup>1627</sup> EVD-OTP-00457.

<sup>1628</sup> ICC-01/04-01/06-2748-Conf, para. 290. Contrary to the Prosecutor’s claim, the expression “children” as used in this document refers without any doubt to the rank and file soldiers of the FPLC, whatever their age. See also *supra*, Part IV.

<sup>1629</sup> Witness W-0055 confirmed that the recruitment carried out by the commanders was not recorded in any report. T-175-CONF-FRA-CT, p. 63, line 7, to p. 64, line 8.

that “the accused was provided with reports of villages that refused to provide recruits”:<sup>1630</sup> at no time did this witness or any other witness suggest that the Accused was furnished with recruitment reports; Witness W-0055 merely claimed that a discussion took place between a person named Mafuta and Thomas Lubanga on the matter of the Bogoro massacre.<sup>1631</sup>

840. The role and conduct ascribed to G5 Staff Officer Eric Mbabazi,<sup>1632</sup> who allegedly personally carried out awareness drives amongst the civilian population to convince young people to enlist in the army, cannot under any circumstance establish an “essential contribution” on the part of the Accused himself to military recruitment activities. On the contrary, this shows that the activities relating to the enlistment and training of recruits were conducted without the Accused’s personal participation and fell solely within the ambit of the military authorities.

*- The Accused’s participation at public events*

841. The Legal Representatives claim that “Mr Thomas Lubanga Dyilo issued public calls, both in person and by other means, to the civilian Hema population to be mobilised into the ranks of the UPC/FPLC. He implemented, or at least contributed essentially to, the practice within the UPC/FPLC of encouraging the Hema population to participate in the war effort, in particular by providing young recruits, including children under the age of fifteen years”.<sup>1633</sup>
842. The Chamber will note that none of the evidence adduced by the Legal Representatives supports these claims.

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<sup>1630</sup> ICC-01/04-01/06-2748-Conf, para. 180.

<sup>1631</sup> T-176-CONF-FRA-CT, p. 21, line 15, to p. 23, line 4.

<sup>1632</sup> ICC-01/04-01/06-2748-Conf, paras. 289-292.

<sup>1633</sup> ICC-01/04-01/06-2744-Conf-tENG, para. 54

843. None of these speeches, all of which are subsequent to May 2003, sought to encourage the enlistment of minors into the FPLC. These political speeches, designed to secure the support of the people and, where necessary, to encourage them to take the necessary measures to protect themselves, cannot under any circumstances be considered as characterising an “essential contribution” to the commission of the prosecuted crimes.

*- The allocation and use of recruits*

844. The Prosecutor does not claim that the Accused was personally involved in the assignment of recruits within military units at the end of their training or, *a fortiori*, in the use of these soldiers in carrying out military operations. Such matters were dealt with by the commanders of the military units acting on the orders of the Chief of Staff.

845. It follows that no “essential contribution” on the part of the Accused can be observed in respect of FPLC soldiers’ “active participation in hostilities”. His capacity as *de jure* President and “commander-in-chief” is immaterial in assessing his criminal responsibility as co-perpetrator and not as superior, accomplice or “principal”.

**2.3 The absence of minors amongst the soldiers assigned to guard the Accused**

846. The Prosecutor claims that “the Accused had children under the age of 15 in his own protection unit, his Presidential Guard”.<sup>1634</sup>

847. As previously shown, this accusation relies on inaccurate and mendacious allegations.<sup>1635</sup> Witnesses D01-0011 and D01-0019 clearly confirmed that there

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<sup>1634</sup> ICC-01/04-01/06-2748, para. 298.

<sup>1635</sup> See analysis of Witness W-0016, *supra*, paras. 405-424 (14 years old). The Prosecutor distorts the testimony of Witness W-0016 by claiming that the witness alleged that four children were between 13 and 14 years of age, whereas the witness clearly said that less than four (“not four”) children could have been under the age of 15 and that the youngest could have been 14.

were no children under the age of 15 years amongst the soldiers assigned to guard the Accused.<sup>1636</sup>

848. On this point, it should be emphasised that the Prosecutor concealed from the Defence exonerating testimony of prime importance from a former bodyguard of the Accused confirming beyond any doubt whatsoever that there were no child soldiers under the age of 15 years in the FPLC or, for that matter, within his "Presidential Guard".<sup>1637</sup> The late disclosure of this testimony made it impossible for the Defence to meet this witness in a timely manner as part of its investigations and to arrange for him to appear before the Chamber.<sup>1638</sup>

#### **2.4 The exclusive powers of the military authorities**

849. The enlistment, training and use of FPLC soldiers fell within the exclusive powers of the military hierarchy and were decided upon and implemented by the leaders of the armed wing of the UPC/RP with the Accused playing no role therein.

*- The enlistment and training of soldiers fell within the exclusive powers of the military hierarchy*

850. As previously shown, the constitution of the armed force organised in September 2002 under the name FPLC took place on the initiative and under the sole leadership of the dissident soldiers of the APC and of Chief Kahwa, at a time when the Accused could not in any way have been involved in such events.

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<sup>1636</sup> D01-0011: T-347-FRA-ET, p. 24, line 22, to p. 25, line 2, and D01-0019: T-341-FRA-ET, p. 11 line 23, to p. 12, line 4.

<sup>1637</sup> See ICC-01/04-01/06-2657-Conf-tENG, paras. 279-280 and EVD-D01-00773.

<sup>1638</sup> The report of the interview on 13 September 2006 with [REDACTED] was disclosed to the Defence on 21 October 2010, whereas the Defence began the presentation of its evidence on 27 January 2010. ICC-01/04-01/06-2657-Conf-tENG, para. 281.

851. It follows clearly from the testimony of W-0016 and W-0055,<sup>1639</sup> called to testify by the Prosecutor, that recruitment and training fell within the powers of the military authorities. Defence Witness D01-0037<sup>1640</sup> confirmed this.
852. Witness W-0055, [REDACTED], confirmed that in order to increase their military potential, the unit commanders decided themselves, depending on the prevailing circumstances, to carry out enlistment without consulting their superiors.<sup>1641</sup>
853. It is apparent from these observations that, prior to September 2002 and during the entire period of the charges, the military leaders themselves decided upon and implemented measures they deemed necessary to secure an armed force.
854. The fact that the military leaders of this armed force decided to choose the Accused as political leader had no bearing whatsoever on the constitution or leadership of this armed force. Generally speaking, it is clear that, regardless of which political leader was selected to lead the UPC/RP, the recruitment and military training operations, and the execution of the military operations themselves, depended solely on the authority of the military leaders.

*- The assignment and use of soldiers fell solely within the authority of the military hierarchy.*

855. As previously shown, under the leadership of the Chief of Staff, the commanders had sole command of the units assigned to them, and they alone decided on the assignment of the soldiers comprising those units.

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<sup>1639</sup> W-0016 stated that recruitment was one of the duties of the G3 and G5 officers, who submitted their report to the Chief of Staff: T-189-CONF-FRA-CT, p. 78, lines 21, to p. 79, line 4, and p. 80, lines 9-13; W-0055 stated that the G5 was in charge of matters relating to recruits: T-175-CONF-FRA-CT, p.77, lines 2-12.

<sup>1640</sup> D01-0037: The G5 was responsible for mobilising people to go to the training centre. T-349-FRA-ET, p. 55, lines 5-9.

<sup>1641</sup> T-175-CONF-FRA-CT, p. 63, line 7, to p. 64, line 8.

856. At no time did the civilian authorities interfere in the execution of military operations. Witness W-0041 emphasised the secrecy surrounding those operations.<sup>1642</sup> Witness W-0055 confirmed that the Accused played no role in planning or executing military operations or in organising the military structure itself.<sup>1643</sup>

857. Thus, the Accused made no “essential contribution” whatsoever to the commission of the prosecuted crimes. Moreover, the following observations show that there was no criminal intent on the part of the Accused.

## II. SUBJECTIVE ELEMENTS

### 1. The *mens rea* specific to the crime of enlistment

858. The Elements of Crimes require the demonstration that “[t]he perpetrator knew or should have known that such person or persons were under the age of 15 years”.

859. It has been demonstrated in the foregoing that assessing the age of recruits is a highly inexact science and that in the present case, no evidence has been brought to show that children under the age of 15 years were actually present in the FPLC.

860. It follows that no evidence has been brought to show that the Accused “knew” that there were children under the age of 15 years in the FPLC.

861. For the same reason, it cannot be argued that the Accused “should have known” that there were children under the age of 15 years in the FPLC.

862. Furthermore, the position of President of the UPC/RP, which confers the status of *de jure* “Commander-in-Chief” of the FPLC, does not require the President himself personally to ensure that all the recruits were over the age of

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<sup>1642</sup> T-126-CONF-FRA-CT, p. 40, lines 22-4.

<sup>1643</sup> T-178-CONF-FRA-CT, p. 60, line 22, to p. 61, line 5, and T-175-CONF-FRA-CT, p. 32, lines 1-3, and p. 34, lines 13-19.

15 years. This obligation rests on the military authorities in charge of recruitment and training and, subsequently, on unit commanders responsible for assigning and using troops.

863. In the present case, the Accused is not being prosecuted on the basis of superior responsibility due to alleged failings imputable to the military authorities, or for failing to take necessary and appropriate measures when he was allegedly aware that there may have been children under the age of 15 years in the FPLC.

864. The trial has shown in this regard that, as soon as he became aware that there might be minors under the age of 18 years in the FPLC, the Accused immediately took those decisions which were in his power to take to prohibit this practice and arrange for the demobilization of the minors. The observations below provide ample proof of his efforts.

## **2. The *mens rea* required by article 30**

865. The mental element required by article 30 assumes that it is demonstrated that the virtually certain consequence (“in the ordinary course of events”) of the conduct ascribed to the accused would result in the objective elements of crimes being met and also that the accused was aware of and accepted that consequence.

866. Neither of these two conditions is met in the present case.

### **2.1 The crimes being prosecuted are not the “virtually certain consequences” of the conduct ascribed to the accused person**

867. It has been demonstrated previously that the Accused played no part in recruiting FPLC soldiers and in using them in the context of the activities of this armed force.

868. Nor can it be held that the simple fact, in the context of the present case, of forming an armed force and using it in an armed conflict would have the “virtually certain consequence” of the crimes of enlistment and conscription of children under the age of 15 years being committed, together with the use of said children to participate actively in hostilities.
869. In this regard, the Prosecutor merely maintains that “the Accused knew that his recruitment programmes and awareness campaigns resulted in the conscription, enlistment and use of children into the UPC/FPLC, or at the very least that the recruitment policies would likely lead to the enlistment and conscription of children, including children under the age of 15, for use in combat”<sup>1644</sup> [emphasis added].
870. The notion of probability, low or high, adopted by the Prosecutor does not meet the requirements of article 30. By nature, participation in an armed conflict posed a risk of criminal conduct. Incidentally, it is reasonable to assume that war crimes have taken place during all armed conflicts without exception. Nonetheless, international law has never concluded as a result that any decision to participate in an armed conflict was *ipso facto* criminal in that it “probably” resulted in the commission of criminal acts.
871. For this reason, the element of intent required by article 30 must be assessed in light of an intrinsically criminal specific operation, rather than a general “policy” which in itself is not criminal, and also requires the virtual certainty that the crime would be committed to be demonstrated rather than a mere probability, be it high or low.
872. In the present case, none of the crimes being prosecuted could be considered a virtually certain consequence of an armed force being constituted and used in the context of an armed conflict.

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<sup>1644</sup> ICC-01/04-01/06-2748-Conf, para. 307.

*- Voluntary enlistment*

873. The voluntary enlistment of children under the age of 15 years cannot be considered to be the virtually certain consequence of recruitment operations.
874. Firstly, even assuming that the military authorities had carried out no age verification, the voluntary enlistment of young recruits, including after awareness campaigns amongst the civilian population, did not necessarily result in children under the age of 15 years joining the FPLC. For example, Witness W-0038 described, in his own testimony, an operation which aimed to convince the civilian population in a village to provide recruits. However, the witness confirmed that at the end of the operation, all candidates for enlistment were over the age of 15 years.<sup>1645</sup>
875. There is no evidence to suggest that initiatives to convince children to enlist voluntarily may have been carried out in primary or secondary schools, in other words, in circumstances where the voluntary enlistment of children under the age of 15 years might be considered to be a virtually certain consequence. The manifestly mendacious allegations<sup>1646</sup> that recruitment had taken place in schools only mentioned forcible enlistments.
876. Secondly, even though in the prevailing circumstances it was extremely difficult to verify the ages of recruits, the principle of conducting age verifications was in force in the FPLC and should have resulted in the exclusion of recruits who were too young.
877. Therefore, even though he could not confirm that age was actually mentioned in the enlistment registers, Witness W-0055 confirmed that age should generally have been recorded therein.<sup>1647</sup> He also pointed out that, faced with

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<sup>1645</sup> T-114-CONF-FRA-CT, p. 28, line 1, to p. 29, line 2; p. 74, line 17, to p. 75, line 1; and p. 76, line 8, to p. 77, line 5.

<sup>1646</sup> See analysis of Prosecution witnesses.

<sup>1647</sup> T-175-CONF-FRA-CT, p. 82, lines 3-11.

the desire of some young people to enlist, commanders rejected them and drove them away because they were too young.<sup>1648</sup> Lastly, he added that he himself, [REDACTED], had had to order that a child who was not old enough to be enlisted be sent away.<sup>1649</sup> The witness thus confirmed both that the rules in force in the FPLC prohibited the recruitment of young children and that these rules were indeed implemented.<sup>1650</sup> Any deliberate enlistment of children under the age of 15 years by military authorities was, therefore, an infringement of the prohibition issued by the UPC/RP authorities and the military leaders. In this regard, the Prosecutor seriously misrepresents the testimony of D01-0011, who stated that the procedures for verifying the ages of recruits were not his responsibility.<sup>1651</sup>

878. The existence of these rules was such as to reduce considerably the risk of enlisting children under the age of 15 years, even though the military authorities had no means of verifying the age of recruits with sufficient certainty.<sup>1652</sup>
879. It follows that even in the extremely unstable context of 2002-2003 in Ituri, the fact that military recruitment took place could not be considered inevitably to lead to the enlistment of children under the age of 15 years.
880. It should also be emphasised that the risk of enlisting children under the age of 15 years in connection with the establishment of an armed force, whilst it can never be dismissed, is difficult to assess and could not, in the context of this period, be placed on the same footing with the urgent need to deal with

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<sup>1648</sup> T-177-CONF-FRA-CT, p. 54, line 22, to p. 55, line 3.

<sup>1649</sup> T-177-CONF-FRA-CT, p. 56, line 16, to p. 60, line 8.

<sup>1650</sup> See *supra*, analysis of witness W-0055.

<sup>1651</sup> T-347-CONF-FRA-CT, p. 33, line 27, to p. 34, line 19. The excerpt quoted by the Prosecution refers to a statement the witness made regarding the presence of child soldiers in Bunia on his return in late May 2003 and bears no relation to the procedures for verifying the ages of recruits in the training camps.

<sup>1652</sup> The trial has shown that, even after seven years of investigations, the Prosecution itself is unable to establish the age of its witnesses.

widespread and systematic massacres of defenceless civilian populations.<sup>1653</sup> One of the principal duties of any political or military leader was to constitute an armed force able to restore order and security. To refuse to take this risk by objecting to military recruitment operations would have constituted a serious dereliction of the duty of any political leader to protect civilians.

*- Conscription and participation in hostilities*

881. The Prosecutor does not make clear how the alleged plan he refers to, and the essential contribution he ascribes to the Accused, was to result in the inevitable consequence of the conscription of children under the age of 15 years; in other words, the use of force or even violence to enlist them against their will into the FPLC and to use them to participate actively in hostilities.
882. In fact, the Prosecutor's argument implicitly rests on the unacceptable premise that, immediately they acted, the FPLC soldiers, and their leaders in particular, were by nature destined to violate the principles of humanitarian law and fall guilty of criminal violence against children under the age of 15 years. The very fact that the FPLC existed as an armed force which conducted recruitment and participated in military operations would therefore have been sufficient to render the commission of such crimes "virtually certain".
883. This view clearly conflicts with the very principle of the criminal responsibility of individuals: their capacity not to commit acts prohibited by criminal law. By nature, any individual to whom the exonerating situations provided for in article 31 do not apply has the necessary discernment and freedom to act within the law. It follows that the Accused had no reason to foresee that crimes would inevitably be committed by FPLC soldiers and their

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<sup>1653</sup> For example: D01-0004: T-243-CONF-FRA-CT3, p. 30, line 20, to p. 33, line 18, and p. 38, line 10, to p. 40, line 11; D01-0037: T-349-FRA-ET, p. 6, lines 18-20; D01-0006: T-254-CONF-FRA-CT, p. 76, line 21 to p. 77, line 4; W-0017: T-160-CONF-FRA-CT, p. 35, line 20 to p. 38, line 10; D01-0011: T-346-FRA-ET, p. 62, lines 2-8; D01-0007: T-348-FRA-ET, p. 48, line 28, to p. 49, line 7, and p. 51, line 27, to p. 52, line 1.

superiors, and specifically the crimes of “conscripting” children under the age of 15 years and using these children in “hostilities”.

884. There is no evidence to suggest that the Accused was personally involved in forcible recruitment. It has been demonstrated in the foregoing that the allegations of forcible enlistment were made by witnesses whose statements are manifestly mendacious.<sup>1654</sup>
885. There is no evidence to suggest that the Accused ordered the use of force or instigated the use of force to carry out military recruitment. Moreover, the Accused is not being prosecuted on the basis of criminal responsibility of this nature.
886. There is no evidence to suggest that the Accused was informed or would have had reason to know that one of his subordinates had carried out this type of recruitment or that it was on the verge of taking place. Moreover, the Accused is not being prosecuted on the basis of superior responsibility.
887. *A fortiori*, there is no evidence to suggest that the Accused was aware of a widespread or systematic practice of forcible enlistment. None of the documents which set out the complaints of the civilian population about the FPLC soldiers mentions protests against forcible recruitment. The *Rapport mensuel* [Monthly Report] which was produced by the G5, Éric Mbabazi, in early November 2002, and which includes a long list of complaints – some of them particularly serious – by the people about the soldiers, does not report any protests against forcible recruitment.<sup>1655</sup> It is self-evident that the Accused was not sufficiently aware of voluntary enlistment and the training of recruits

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<sup>1654</sup> See also: Witness W-0016 confirmed his previous statement that “[TRANSLATION] recruitment was voluntary, since the children, lacking other choices, reported for it. There was no conscription of children.” He added that many of the recruits came voluntarily to avenge their families, and emphasised the fact that “[TRANSLATION] they were keener on volunteering than volunteering itself”. T-189-CONF-FRA-CT, p. 78, line 24, to p. 79, line 4, and T-190-CONF-FRA-CT, p. 64, lines 14-16.

<sup>1655</sup> EVD-OTP-00457.

to characterise any possible acquiescence on his part to hypothetical instances of forcible recruitment.

888. The same applies to the active participation in hostilities of children under the age of 15 years .
889. Moreover, the observations below prove that at no point did the Accused accept or tolerate the commission of the crimes for which he is being prosecuted.

**2.2 The Accused took the measures in his power to prohibit the enlistment of minors and, where necessary, to demobilize them**

890. The trial has shown that the Accused was always hostile to the enlistment of minors in the armed forces and that, during periods when he was in a position to carry out his duties, he took the necessary measures to prohibit this practice and, where necessary, to demobilize the minors in question. In particular, between September 2002 and March 2003, then between late May 2003 and 13 August 2003, the Accused formally prohibited the enlistment of minors and actively implemented measures to demobilize young people under the age of 18 years who had enlisted in the FPLC and in other armed groups.
891. These actions are completely at odds with any attempt to ascribe to the Accused the intent to commit the crimes for which he is being prosecuted within the meaning of article 30 of the Statute.
892. Contrary to what the Prosecutor maintains, the policy of prohibiting the enlistment of minors, and the demobilization programmes initiated by the Accused can in no circumstances be described as a “masquerade”. Analysis of the testimonial and documentary evidence produced during the trial proves the sincerity and effectiveness of his efforts. Ms Kristine Peduto, a MONUC official responsible for children’s and human rights in 2002-2003, acknowledged that the UPC/RP, under the leadership of Thomas Lubanga,

was the only political and military organisation to take such initiatives during this highly unstable period.<sup>1656</sup>

### 2.2.1 Decision of 21 October 2002 and order of 30 October 2002

893. The Accused commenced his duties as President of the UPC/RP in early September 2002.<sup>1657</sup>
894. Immediately after assessing the situation and participating in the establishment of the necessary political, administrative and military institutions, having noted that minors were members of various armed forces in Ituri, the Accused notified the military authorities of the formal prohibition on the recruitment of minors.
895. On 21 October 2002, he issued the following order to the FPLC chief of staff: “[TRANSLATION] As far as our armed wing, the ‘FPLC’, is concerned, I hereby formally prohibit this practice, which conflicts with our former activities with the NGO *SOS Grands Lacs*, to demobilize child soldiers. In this regard, I would like to point out that I attach particular importance to the implementation of this order, and will tolerate no failure to do so.”<sup>1658</sup>
896. On 30 October 2002, the FPLC Chief of Staff, Floribert Kisembo, issued the following instructions to all unit commanders: “[TRANSLATION] within 2 (two) weeks, you must disarm all children, in other words, anyone under the age of 18 years, with immediate effect. This includes those in the self-defence forces. We await your disarmament report within 15 (fifteen) days, by 15 November 2002 at the latest.”<sup>1659</sup>

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<sup>1656</sup> EVD-OTP-00494, T-39-FRA-ET, p. 96, lines 1-6.

<sup>1657</sup> W-0041: T-125-CONF-FRA-CT, p. 20, lines 10-13.

<sup>1658</sup> EVD-OTP-00696. This document was disclosed to the Defence by the Office of the Prosecutor on 31 March 2006.

<sup>1659</sup> EVD-D01-01096.

897. The Prosecutor claims that these instructions were only issued following “complaints from the international and NGO community” and were “compiled irregularly, and in violation of UPC administrative rules” and that demobilization did not actually take place. He accordingly concludes that these orders from the Accused and from the FPLC Chief of Staff were merely a “sham”.<sup>1660</sup>

898. These arguments do not withstand a factual analysis.

*- The existence of pressure and complaints from the international community and NGOs*

899. Firstly, it has not been shown that there actually was any “pressure” or “complaints” regarding the presence of minors in the FPLC during September and October 2002. Contrary to what the Prosecutor maintains, the evidence regarding the meetings between civilian leaders of the UPC/RP and General Diallo of MONUC shows, firstly, that these meetings took place in February 2003<sup>1661</sup> and, secondly, that the issue of child soldiers was not raised at the meetings. They dealt only with the issues raised by the establishment of the Ituri Pacification Commission provided for by the Luanda Agreement.<sup>1662</sup> It has not been shown that, at any time during this period, the UPC/RP authorities were subjected to “pressure” or “complaints” in connection with the presence of minors in the FPLC. Witness W-0012 emphasised that initial meetings on this subject with experts from MONUC or other NGOs were held in late August or early September 2003.<sup>1663</sup>

900. Secondly, at no time did the civilian or military authorities of the UPC/RP make representatives of the “international community” or NGOs aware of the documents of 21 and 30 October 2002. The letter of 21 October was only for the

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<sup>1660</sup> ICC-01/04-01/06-2748-Conf, paras. 319 *et seq.*

<sup>1661</sup> T-129-CONF-FRA-CT, p. 51, lines 2-7.

<sup>1662</sup> EVD-OTP-00577, 00:36:40 to 01:55:00.

<sup>1663</sup> T-168-CONF-FRA-CT, p. 84, lines 10-24.

internal use of the UPC/RP and FPLC until the Office of the Prosecutor acquired it during its investigations. The document of 30 October remained confidential until it was used by the Defence in the present case. The argument that they were written for the sole purpose of securing false accreditation from MONUC and NGOs of a fictitious plan to demobilize minors is thus manifestly erroneous.

*- The alleged irregularities affecting documents*

901. The Prosecutor does not challenge the authenticity of these documents. He merely maintains that as the manner in which they were issued did not comply with the administrative rules in force within the administration,<sup>1664</sup> the exact date on which they were written was questionable.

902. Firstly, the doubt which the Prosecutor attempts to cast on the date of these documents conflicts with his claim that they were issued with the sole purpose of responding to pressure exerted in September and October 2002.

903. Secondly, the vain attempts by the Prosecutor to argue the alleged administrative irregularities casting doubt on these documents were definitively disproved by Witness D01-0011.<sup>1665</sup> He provided specific and convincing explanations which allow the theory of tampering to be dismissed without a shadow of a doubt.<sup>1666</sup> Moreover, given that these documents

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<sup>1664</sup> It was established that within the UPC/RP, there was no "*Réglementation administrative de l'UPC*" [UPC administrative regulations] governing the formatting and numbering of correspondence. On the contrary, Witness D01-0011 clearly confirmed in this regard: "[TRANSLATION]...this was a problem of habit; it wasn't an administrative rule which was established by the Presidency [...] this is what emerged through a sort of routine, a habit." T-348-FRA-ET, p. 12, lines 3-13.

<sup>1665</sup> T-347-CONF-FRA-ET, p. 62, line 18, to p. 66, line 18.

<sup>1666</sup> Witness D01-0011 stated that he typed and registered the demobilization order of 21 October 2002: T-346-FRA-ET, p. 67, lines 9-19. He explained that documents from the President's Office were recorded either at his private office or with the head of his immediate office, as each of these offices had its own register. As regards document EVD-OTP-00505, which is dated 30 November 2002 and has a lower reference number to that of 21 October 2002, the witness confirmed that, although the document format was that which he would normally use, he did not register the document himself, as the writing used to insert the date and registration number was not his. The numbering is not an anomaly but may be explained by the fact that this type of document, an internal memo in other

remained within the UPC/RP, there is no plausible explanation as to why the signatory authorities would have tampered with them so pointlessly.

*- The implementation of orders issued*

904. Contrary to what the Prosecutor maintains, these orders were implemented.
905. Prosecution Witness W-0024 confirmed that during the autumn of 2002, operations to demobilize minors did in fact take place.<sup>1667</sup>
906. Witnesses D01-0019 and D01-0011 confirmed that these demobilization orders aimed at underage children in the armed forces in Ituri were discussed by the UPC/RP executive and were followed by implementation measures.<sup>1668</sup> Witness D01-0019 stated, in particular, that Ms Mélanie Lumbulumbu, National Secretary for Social Affairs, was tasked with dealing with the demobilized children and that she reported back on her activities at a meeting of the UPC/RP executive at which D01-0019<sup>1669</sup> was present.
907. Finally, the Prosecutor grossly misrepresents the content of the “*rapport interne de Mbabazi*” [Mbabazi internal report]:<sup>1670</sup> at no time does this report mention the deliberate recruitment of minors. As previously demonstrated,<sup>1671</sup> there is no doubt whatsoever that the expression “the children” in the context of this document refers to the soldiers in the ranks of the FPLC rather than to recruits who were minors.
908. Accordingly, it has been shown that as soon as he took up his duties as leader of the UPC/RP government in September 2002, the Accused clearly

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words, could have been drafted by the private secretary but registered at the President’s immediate office: T-348-FRA-ET, p. 12, lines 7-26, and p. 14, lines 1-12. MONUC seized the registers in which the registration numbers were recorded: T-347-FRA-ET, p. 66, lines 2-8.

<sup>1667</sup> T-170-CONF-FRA CT, p. 52, lines 1-6.

<sup>1668</sup> D01-001: T-347-CONF-FRA-ET, p. 16, line 10, to p. 17, line 5, and T-348-FRA-ET, p. 4, line 20, to p. 5, line 2. D01-0019: T-341-FRA-ET, p. 35, lines 6-24.

<sup>1669</sup> T-341-FRA ET, p. 8, line 17, to p. 9, line 18.

<sup>1670</sup> ICC-01/04-01/06-2748-Conf, paras. 331-332.

<sup>1671</sup> See *supra*, Part IV.

demonstrated his intent to prohibit the recruitment of minors in the armed forces and to implement the necessary measures to demobilize any whose presence in the armed forces might have been observed. From that point onwards, this clearly stated intention was translated into unequivocal action.

### 2.2.2 Report request of 27 January 2003 and report of 16 February 2003

909. On 27 January 2003, the Accused sent the following request to the FPLC Chief of Staff: “[TRANSLATION] Further to my letter no. 287/UPC/RP/CAB/PRES/2002 dated 21 October 2002 wherein I formally prohibited the enlistment of children under the age of 18 years into the FPLC army, kindly provide me at the earliest opportunity with a detailed report on this issue, which I take extremely seriously. This is an order.”<sup>1672</sup>

910. On 16 February 2003, the FPLC Deputy Chief of Staff wrote to the “A.G.S/U.P.C.”<sup>1673</sup> regarding the “*rapport de désarmement des enfants soldats*” [report on the disarmament of child soldiers] as follows:

[TRANSLATION] Further to your meeting with the General Staff on 8 February on the UPC President’s concern as to the disarmament of children (Instructions of 21 October 2002 and letter no. 013/UPC/RP/PRES/2003 of 27 January 2003,

1. The instruction was properly transmitted to all our major U[nits].
2. Our U[nits] are facing fierce resistance from the leaders of the self-defence forces, who are refusing to demobilize and disarm children in their groups.
3. We request that you propose an alternative solution because we do not know what to do.<sup>1674</sup>

911. These documents establish that the Accused was continually concerned about the demobilization of armed minors in Ituri.

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<sup>1672</sup> EVD-OTP-00697.

<sup>1673</sup> AGS: *agent général de sécurité* [general security officer].

<sup>1674</sup> EVD-D01-01097.

912. They also establish that the Accused's instructions were indeed conveyed to the military authorities at various levels with the authority to implement them.
913. Lastly, they establish that these instructions were implemented and that there were major difficulties in doing so, in particular regarding the demobilization of children in the self-defence forces.
914. The Prosecutor is challenging neither the authenticity of the documents nor the date on which they were written. He merely maintains that "this order was also a sham, never intended to be implemented but issued because of the continued pressure by the UN and international community".<sup>1675</sup>
915. This analysis does not withstand scrutiny for the reasons previously advanced: since people and institutions outside the UPC/RP and FPLC were never made aware of these documents, it is inconsistent to argue that they were drafted with the sole intent to deceive "the international community"<sup>1676</sup> with false appearances. Furthermore, there is no evidence to suggest that the UPC/RP authorities approached MONUC or NGOs to convince them that measures to demobilize minors had been taken. The argument that there was active and deliberate disinformation in this regard is, therefore, wholly unfounded.
916. In addition, the fact that the Accused visited the Rwampara training camp in February 2003 and that he might have noted the presence of minors among the recruits on this occasion does not conflict with his repetition of his instructions to demobilize minors; quite the contrary.
917. It is self-evident that the speech the Accused delivered on that occasion,<sup>1677</sup> in which he addressed the young people present in a friendly manner, cannot

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<sup>1675</sup> ICC-01/04-01/06-2748-Conf, para. 334.

<sup>1676</sup> These documents remained confidential until they were used in the present case.

<sup>1677</sup> EVD-OTP-00570. Transcript. See T-128-CONF-FRA-CT, p. 36, line 3, to p. 40, line 23.

under any circumstances be regarded, as the Prosecutor maintains, as evidence that “he condoned the use of children in the UPC/FPLC”.<sup>1678</sup> Indeed, his kindness towards these irreproachable young people must be set against the backdrop of the uncompromising and firm instructions he issued to the military authorities regarding the demobilization of minors.

918. Finally, as previously shown,<sup>1679</sup> it is incorrect to claim that FPLC logbooks for the same period show that children were used in combat. Once again, the Prosecutor grossly misrepresents the military expression “the children”,<sup>1680</sup> which unequivocally refers to FPLC soldiers regardless of age.

### 2.2.3 Letter of 12 February 2003

919. On 12 February 2003, the National Secretary for Education, Mr Adubango Biri, sent a letter to the “[TRANSLATION] G5 commander of the *Forces Patriotiques pour la Libération du Congo*”, informing him that a programme to demobilize child soldiers was being implemented jointly with “[TRANSLATION] the humanitarian organisation Save the Children”. The letter stated that the programme would initially involve organising a “[TRANSLATION] training and information workshop”, to be held on 17 and 18 February 2003, together with a “[TRANSLATION] training seminar”, scheduled for 24 to 28 February 2003. In the same letter, the National Secretary for Education requested the G5 Staff Officer to appoint 13 officers to take part in the workshop and seminar. The letter also stated: “[TRANSLATION] you will be informed of the remainder of the full programme in due course, prior to the definitive launch of the DDRRR operation, in late March 2003 or thereabouts”.<sup>1681</sup>

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<sup>1678</sup> ICC-01/04-01/06-2748-Conf, para. 336.

<sup>1679</sup> See *supra*, Part IV.

<sup>1680</sup> ICC-01/04-01/06-2748-Conf, para. 337.

<sup>1681</sup> EVD-OTP-00518.

920. This document confirms the effective implementation of the demobilization decisions previously taken as part of a specific programme organised in cooperation with an NGO which specialises in child protection. Witness W-0031, whose bias towards the Prosecution is clear, confirmed, however, that in late 2002 and early 2003, partners from Save the Children met the UPC/RP with authorities to discuss demobilization.<sup>1682</sup> He confirmed that the UPC/RP and Save the Children organised a seminar on this subject shortly before 6 March 2003, and maintained that his organisation received a report on that subject.<sup>1683</sup>
921. Witness D01-0019 confirmed that the programme was effectively in progress.<sup>1684</sup> The programme was abruptly interrupted by the events of 6 March 2003 and the ensuing dismantlement of UPC/RP institutions. In this regard, the Prosecutor, who challenges neither the authenticity nor the date of this document, does not dispute the fact that the workshop and seminar planned for February 2003 did indeed take place.

#### **2.2.4 25 February meeting between delegates from the self-defence committees and the President of the UPC/RP**

922. On 25 February 2003, a meeting between delegates from the self-defence committees and the President of the UPC/RP, Thomas Lubanga, was held in Bunia.
923. The minutes of the meeting, which were taken by Witness D01-0007,<sup>1685</sup> state that the agenda items included both the “[TRANSLATION] security situation” and also the “[TRANSLATION] demobilization and disarmament of our self-defence committee”.

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<sup>1682</sup> T-199-CONF-FRA-CT, p. 46, lines 4-25.

<sup>1683</sup> T-199-CONF-FRA-CT, p. 51, line 11, to p. 52, line 6.

<sup>1684</sup> T-346-FRA-ET, p. 38, lines 2-18. See also D01-001: T-347-CONF-FRA-ET, p. 38, line 21, to p. 40, line 5.

<sup>1685</sup> EVD-D01-01095.

924. The minutes state:

[TRANSLATION] Regarding the demobilization and disarmament of children in our self-defence committee, we have seen that this is not a good time, since the number of attacks is increasing and disarmament is not possible because without weapons we are unable to stay alive. And often soldiers turn up late when the Lendu fighters have already caused damage (burning down our huts and killing people + pillaging). Even if the President insists, we want the soldiers to drive these Lendu fighters far from our villages before allowing ourselves to be disarmed. Or maybe this is a policy to stop us from defending ourselves. In the end, after a brief consultation, we decided that the FPLC should not disarm us but that children should be able to hand over weapons to adults. The President has requested that he does not want children to start going to the front either, and we have agreed.

925. Witness D01-0007, the author and a signatory of the document, described the circumstances of the meeting and confirmed that the minutes were accurate.<sup>1686</sup>

926. Witness D01-0019 confirmed that the executive had discussed the situation of children within the self-defence groups and that the strong opposition by the self-defence committees made it difficult for the UPC to implement these measures.<sup>1687</sup>

927. Accordingly:

- The Accused's instructions for the demobilization of minors bearing arms were aimed not only at those within the FPLC, but also at children mobilized in the villages by the self-defence groups.
- The implementation of the instructions met with robust resistance from the leaders of the self-defence groups, who were keen to be able to provide for the security of their people themselves.
- The Accused nonetheless managed to convince these leaders to disarm the children and not to expose them to further combat.

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<sup>1686</sup> T-348-FRA-ET, p. 23, line 24, to p. 25, line 24.

<sup>1687</sup> T-341-FRA-ET, p. 4, line 5, to p. 5, line 17.

928. Once again, these observations prove not only that the Accused did not tolerate the involvement of children under the age of 15 years in military activities at any time, but also that during all the periods when he wielded authority, he acted tirelessly to prevent the enlistment of minors into armed groups.
929. The Prosecutor does not challenge either the authenticity or the date of these minutes. Nor is he disputing the fact that the meeting took place. However, he claims, against all the evidence, that there were no self-defence groups in the villages after September 2002, when they were all allegedly incorporated in the ranks of the UPC/FPLC at its inception.<sup>1688</sup>
930. This position is unfounded.
931. In the first instance, it is inaccurate to claim that Witness D01-0037 confirmed that the self-defence groups were dissolved after September 2002. Witness D01-0037 merely confirmed, in a completely accurate manner, that in September 2002 the armed forces which were set up at the behest of Chief Kahwa and the APC dissident soldiers were incorporated into the FPLC.<sup>1689</sup> At no point did this witness claim that all the self-defence groups formed in Ituri's villages joined the FPLC.<sup>1690</sup> The same applies to the testimony of Witness W-0017. This witness stated that he joined the FPLC in September 2002 but at no time did he claim that all the self-defence groups did so. The argument that in September 2002 all the villages in Ituri willingly forwent the means required to guarantee their security is, from all indications, highly unlikely.

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<sup>1688</sup> ICC-01/04-01/06-2748-Conf, paras. 349-355.

<sup>1689</sup> T-349-FRA-ET, p. 7, lines 8-24.

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932. Secondly, the minutes of the meeting of 25 February 2003,<sup>1691</sup> whose content has not been called into question by the Prosecutor, and the detailed explanations of Witness D01-0007,<sup>1692</sup> confirm indisputably that throughout that period, and even well beyond the period of the charges, village self-defence groups continued to exist and to act autonomously.<sup>1693</sup>
933. A letter from the Accused to the Chief of Staff on 10 December 2002 on the recovery of military equipment “[TRANSLATION] scattered about in an uncontrolled fashion among the civilian population” clearly indicates that local self-defence groups existed (procurement of weapons of war by the leader of a *collectivité*; references to “tribal protagonists”).<sup>1694</sup>

### 2.2.5 Decree of 1 June 2003 and implementation order of 5 June 2003

934. On 1 June 2003, three days after his return to Ituri, the Accused issued a decree “[TRANSLATION] to demobilize child soldiers from the *Forces Patriotiques pour la Libération du Congo*”. The decree stipulated that “[TRANSLATION] all individuals under the age of 18 years are, with effect from today, demobilized from the *Forces Patriotiques pour la Libération du Congo*”. The decree also stipulated that the “*Secrétaire national chargé du suivi*” [National Secretary for Monitoring] and the Chief of Staff were responsible for its implementation.<sup>1695</sup>
935. In a letter dated 3 June 2003, the “*Secrétaire national à la présidence chargé de suivi et des questions militaires*” [National Secretary to the Presidency responsible for Monitoring and Military Issues] notified the decree of 1 June to the Chief of Staff for implementation; the letter issued “[TRANSLATION] an order to

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<sup>1691</sup> EVD-D01-01095.

<sup>1692</sup> T-348-FRA-ET, p. 23, line 24, to p. 25, line 28.

<sup>1693</sup> T-348-FRA-ET, p. 20, line 17, to p. 21, line 23.

<sup>1694</sup> EVD-OTP-00712.

<sup>1695</sup> EVD-OTP-00728.

disseminate the contents of the decree to all our positions for appropriate action".<sup>1696</sup>

936. On 5 June 2003, Chief of Staff Floribert Kisembo, signed a "*note circulaire*" [circular] to all FPLC brigade commanders, issuing "[TRANSLATION] the order to demobilize all persons within our ranks under the age of 18 years, in accordance with the normal procedure".<sup>1697</sup>

- *Background to the decree of 1 June*

937. Witnesses D01-0019 and D01-0011 confirmed that the Accused had only returned to Ituri and Bunia in the last few days of May 2003.<sup>1698</sup> These witnesses described the situation in Bunia and the surrounding area following the departure of the Ugandan troops and the fighting between 6 and 12 May 2003 to gain control of the town. It was characterised by the visible presence of a large number of armed minors from the various armed forces present on the ground: FPLC fighters who had remained loyal to Floribert Kisembo; armed fighters from PUSIC, the armed group set up by Chief Kahwa, who broke away from the UPC/RP in December 2002 and who had been joined by commanders Tchaligonza and Kasangaki in March 2003, along with the troops under their command; armed individuals from the self-defence groups who helped to drive out the Lendu fighters from Bunia; and, generally, civilian fighters who had spontaneously mobilised and armed themselves to deal with the pillaging and massacres committed by the Lendu fighters as soon as the Ugandan forces left. These witnesses emphasised the difficulty in visually

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<sup>1696</sup> EVD-OTP-00679.

<sup>1697</sup> EVD-OTP-00691.

<sup>1698</sup> D01-0011: T-347-CONF-FRA-ET, p. 10, lines 18-1 and p. 12, lines 1-3. D01-0019: T-341-FRA-ET, p. 30, lines 23-28.

identifying the groups to which the armed young people, including children, belonged.<sup>1699</sup>

938. Witness D01-0019 pointed out, in particular, that the Ugandan troops instigated and organised the armed mobilisation of the civilians in Bunia, regardless of age, just before they left the city, thus increasing the number of armed young people in Bunia and the surrounding area, including minors.<sup>1700</sup>

939. This was the context in which, noting the increase in armed minors, the Accused once again ordered that minors be demobilized, as soon as he effectively resumed his duties as President of the UPC/RP.<sup>1701</sup>

*- Reasons for the issuance of the decree*

940. The Prosecutor claims that the Accused only issued the decree because of “complaints [...] by the UN and media”.<sup>1702</sup>

941. This is unfounded conjecture. Conversely, it is indisputable that this decision was taken and publicly broadcast as soon as the Accused returned to Ituri, even before “the UN and media”, or some NGOs, had the time to bring the alleged pressure to bear on him. Moreover, it is clear that at that time the presence of child soldiers was not the prime concern of the “international community” and specifically MONUC. Kristine Peduto, a United Nations official who attended a meeting at the Accused’s house in her capacity as child protection officer, confirmed that she only raised this issue for a few moments as the Accused was escorting his visitors out at the end of the meeting.<sup>1703</sup>

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<sup>1699</sup> D01-0019: T-341-FRA-ET, p. 32, lines 13-25, and D01-0011: T-347-CONF-FRA-ET, p. 13, line 20, to p. 14, line 24. Confirmed by D01-0037: T-349-CONF-FRA-ET, p. 14, lines 4-23.

<sup>1700</sup> T-341-FRA-ET, p. 33, line 5, to p. 35, line 4. See also D01-0011: T-347-CONF-FRA-ET, p. 13, line 20, to p. 14, line 24.

<sup>1701</sup> D01-0011: T-347-CONF-FRA-ET, p. 12, line 22, to p. 13, line 19, and D01-0019: T-341-FRA-ET, p. 31, line 11, to p. 32, line 27.

<sup>1702</sup> ICC-01/04-01/06-2748-Conf, paras. 342-344.

<sup>1703</sup> T-209-CONF-FRA-ET, p. 6, lines 3-7.

942. Witness W-0041 confirmed that the issuance of the decree was discussed at a meeting of the UPC/RP executive and was “[TRANSLATION] the high point of the meeting”.<sup>1704</sup>

*- Effectiveness of the implementation of the decree*

943. The Prosecutor claims that “[t]his decree was also a sham and was not implemented”.<sup>1705</sup>

944. This statement is contradicted by the testimony and documents registered in the record of the case.

945. Firstly, Kristine Peduto acknowledged that she had no knowledge of the order issued by the Chief of Staff to all FPLC commanders in the circular of 5 June 2003.<sup>1706</sup> The same applies to the other internal UPC/RP or FPLC documents on the demobilization of minors. At no point were these internal documents used for propaganda purposes. The argument that these documents were only designed to create a smokescreen to deceive the “international community” is, therefore, clearly unfounded.

946. Secondly, Kristine Peduto herself acknowledged that the 1 June decree was implemented.<sup>1707</sup> She confirmed that some children were handed over to NGOs<sup>1708</sup> rather than simply being transferred to the “headquarters”,<sup>1709</sup> as the Prosecutor claims. Witness W-0031 confirmed that 68 children were demobilized in June 2003.<sup>1710</sup> Witness W-0017 stated that the Chief of Staff

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<sup>1704</sup> T-125-CONF-FRA-CT, p. 45, lines 1-20, and p. 46, lines 11-14.

<sup>1705</sup> ICC-01/04-01/06-2748-Conf, para. 340.

<sup>1706</sup> EVD-OTP-00494, T-39-FR-ET, p. 88, line 11, to p. 89, line 3. EVD-OTP-00691.

<sup>1707</sup> T-206-CONF-FRA-ET, p. 56, line 22, to p. 57, line 15.

<sup>1708</sup> EVD-OTP-00479, T-37-FR-ET, p. 87, lines 9-15.

<sup>1709</sup> Para. 346; this allegation by the Prosecutor is taken from the statements of Witness W-0017 which, in fact, only refer specifically to certain young people who were allegedly in the group of Kisembo, Chief of Staff, rather than all the minors who were demobilized; according to Witness W-0017, these young people complained about the demobilization and stayed within the military compound but without weapons and without uniform: T-158-CONF-FRA-CT, p. 21, lines 14-18, and p. 45, lines 11-21.

<sup>1710</sup> T-200-CONF-FRA-CT, p. 35, lines 7-17.

himself ordered the demobilization of a group of *kadogos*<sup>1711</sup> and confirmed that Caritas was assisting child soldiers demobilized by the FPLC,<sup>1712</sup> which was also confirmed by Witnesses D01-0011<sup>1713</sup> and D01-0019.<sup>1714</sup> Witness W-0041 stated: “[TRANSLATION] the child soldiers were demobilized”.<sup>1715</sup>

947. Thirdly, memoranda drafted in July 2003 by Witness D01-0011<sup>1716</sup> state that on 4 July 2003, the Accused “[TRANSLATION] met with a delegation from the Roman Catholic NGO Caritas headed by Mgr Étienne Ndekosi, who was the Caritas leader in the Bunia Diocese. It is worth recalling that it was this church organisation which agreed to assist and organise the reintegration in society of the child soldiers whom the UPC/RP President had demobilized by a presidential decree on 1 June of this year”.<sup>1717</sup>
948. It is thus proven that the Accused ordered the demobilization of minors in good faith and in extremely difficult circumstances and implemented this measure as best he could.

#### **2.2.6 The “[TRANSLATION] meeting between the Chief of Staff and commanders of major units” on 16 June 2003**

949. The Prosecutor tendered into evidence a hand-written document entitled “*Réunion du 16/06/2003 avec le haut commandement des FPLC*” [Meeting of 16 June 2003 with senior commanders of the FPLC].<sup>1718</sup> This document contains notes which appear to refer to the agenda of the meeting mentioned therein. In particular it states: “[TRANSLATION] [We] are a national political and military movement for the restoration of a new political order in the Congo in general”; and also: “[TRANSLATION] child soldiers: to be disarmed and

<sup>1711</sup> T-158-CONF-FRA-CT, p. 45, lines 9-21.

<sup>1712</sup> T-158-CONF-FRA-CT, p. 61, lines 4-11.

<sup>1713</sup> T-347-CONF-FRA-ET, p. 16, line 15, to p. 17, line 5, and p. 24, lines 16-21, and p. 30, lines 2-6.

<sup>1714</sup> T-341-FRA-ET, p. 35, lines 23-34.

<sup>1715</sup> W-0041: T-125-CONF-FRA-CT, p. 45, line 24, to p. 46, line 3.

<sup>1716</sup> D01-0011: T-347-CONF-FRA-ET, p. 22, line 26, to p. 24, line 17.

<sup>1717</sup> EVD-D01-01094.

<sup>1718</sup> EVD-OTP-00668.

demobilized immediately". Even though the author of the notes is not identified, they were probably written by a senior FPLC leader who attended the meeting.

950. When Witness D01-0037 testified, the Defence tendered into evidence a typed document dated 16 June 2003 on the headed notepaper of the FPLC general staff, entitled "[TRANSLATION] Minutes of the meeting between the Chief of Staff and commanders of major units".<sup>1719</sup>
951. A comparative analysis of these two documents shows that they refer to the same meeting; the hand-written document seems to be a draft for an oral presentation and the typed document, as its title suggests, is the record of the meeting. The Prosecutor does not dispute the authenticity of the typed document, whose date and content are strongly corroborated by the hand-written document.
952. The minutes mention that the Chief of Staff of the FPLC was present together with the deputy Chief of Staff, Bosco Ntaganda, and a number of FPLC senior officers.
953. The minutes, which describe the "[TRANSLATION] current problems" state that: "[TRANSLATION] the child soldiers must also be demobilized. Wherever you find them, bring them back to the NGOs".
954. The minutes also include a question raised by the participants: "[TRANSLATION] Q3: The same applies to the child soldiers. The President has signed a demobilization decree. And you are ordering us to demobilize them from our units even though we have not had any since the prohibition issued as from the establishment of the FPLC. How is this decree relevant to us?". The minutes contain the following reply: "[TRANSLATION] [...] With regard to the few child soldiers seen around town, we need to work on them, as you did

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<sup>1719</sup> EVD-D01-01098.

on the self-defence militias in the field. The decree is for wide-ranging awareness-raising. [...] As it stands, faced with evil, we need to act for the benefit of society as a whole. This is the argument presented by the President, which we have adopted.”

955. An analysis of these two documents dated 16 June 2003 from the FPLC hierarchy demonstrates without question that:

- The demobilization of child soldiers was a priority objective for the FPLC at that point;
- The demobilization policy extended to all armed minors in Bunia and in Ituri, be they “self-defence militias” or other armed groups, including, as applicable, the FPLC;
- The demobilization initiatives were not the first, but had already been carried out previously, in particular with regard to the “self-defence militias”.

956. There is, therefore, no doubt that the Accused initiated a sincere and active demobilization policy for child soldiers as soon as he returned to Bunia in late May 2003 and that it was effectively implemented by the FPLC hierarchy. This policy, far from being an opportunistic “sham”, confirms the long-standing and consistent conduct of the Accused. In June 2003, of all the rebel political and military groups in eastern DRC, the UPC/RP, led by the Accused, was the only one to have initiated such action for child soldiers.<sup>1720</sup>

957. From all these observations it is clear that at no time did the Accused approve, accept or tolerate the enlistment of children under the age of 15 years and, *a fortiori*, their forcible enlistment or active participation in hostilities. On the contrary, the trial has shown that each time he found himself in a position to

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<sup>1720</sup> EVD-OTP-00494, T-39-FRA-ET, p. 96, lines 1-6.

exert his authority, the Accused formally prohibited practices of this nature and ordered the necessary measures to end them. It follows that the mental element required by article 30 for the commission of the crimes charged cannot be established against the Accused.

**FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:**

TO ACQUIT Mr Thomas Lubanga of all the charges against him;

TO ORDER his immediate release.

[signed]

Ms Catherine Mabile, Counsel

Dated this 15 July 2011

At The Hague, The Netherlands